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No. 77-1465

In the Supreme Court of the United States

OCTOBER TERM, 1977

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GENEVIEVE O. RASMUSSEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

GENEVIEVE O. RASMUSSEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A-14A) is reported at 567 F. 2d 1385. The opinion of the Benefits Review Board (App. B, *infra*, pp. 15A-25A) is reported at 1 BRBS 378. The decision of the administrative law judge (App. C, *infra*, pp. 27A-74A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the weekly rate of death benefits under the amended Longshoremen's and Harbor Workers' Compensation Act is subject to the same maximum limitations as apply to benefits payable to a totally disabled worker.[1]

STATUTES INVOLVED

1. Before its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 6(b), 44 Stat. 1426, as amended, 33 U.S.C. (1970 ed.) 906(b):

> Compensation for disability shall not exceed

[1] There is perhaps also a threshold question whether the Director of the Office of Workers' Compensation Programs had standing to seek review of the Benefit Review Board's decision and now has standing to file the present petition for certiorari. Although the matter was left open in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n. 11, it may be that the Director's standing is now settled by this Court's action in granting his petition for certiorari, unsupported by private parties, in *Director, Office of Workers' Compensation Programs, U.S. Department of Labor* v. *Jacksonville Shipyards, Inc., et al.*, 433 U.S. 904. At all events, the question was not raised below or addressed by the court of appeals and is unlikely to be raised here, since, as we are advised, the other respondents will also be filing petitions for certiorari. Nevertheless, should this Court wish the issue briefed, we shall, of course, stand ready to do so.

> $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That, if the employee's average weekly wages, as computed under section 10, are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

Section 9, 44 Stat. 1429, as amended, 33 U.S.C. (1970 ed.) 909:

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> * * * * *
>
> (b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in the case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess

of one: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

* * * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in relevant part:

Section 6(b), (d), 33 U.S.C. (Supp. V) 906(b), (d):

(b)(1) * * * [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1975.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

* * * * *

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Section 9, 33 U.S.C. (Supp. V) 909:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other

than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

STATEMENT

Respondents are the widow and child of Dr. William C. Rasmussen, a hydrologist who was killed on May 11, 1973, by a land-mine explosion in the course of his work in Vietnam for Geo Control, Inc. His employment was within the coverage of the Defense Base Act, 55 Stat. 622, as amended, 42 U.S.C. 1651 *et seq.*, one of the several statutory extensions of the Longshoremen's and Harbor Workers' Compensation Act. When respondents claimed death benefits under the Longshoremen's Act, Geo Control and its workers' compensation insurer, New Hampshire Insurance Co., agreed that benefits were payable, but disputed the weekly rate claimed by the beneficiaries—two-thirds of Dr. Rasmussen's average weekly wages of $798, or $532 a week. The employer and insurer contended that the limitations of Section 6(b)(1) of the Longshoremen's Act, 33 U.S.C. (Supp. V) 906(b)(1)—initially $167 a week, and now $367.22 a week—were applicable to death benefits in the same manner as to benefits for permanent total disability.

The question of the applicability of the Section 6(b)(1) limitations to death benefits was initially litigated before the Deputy Commissioner for the Fifteenth Compensation District of the Department of Labor's Office of Workers' Compensation Programs (OWCP).[2] That was the first occasion to de-

[2] See 20 C.F.R. 701.201–701.203, 701.301(5)–(7), 702.101, 704.101(d).

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velop an administrative construction of the amended provisions, and it was ruled that death cases were not exempt from the limitations announced in Section 6(b)(1), but, on the contrary, that Section 6(d) made those limitations applicable with only this difference: during the "transition" period, the ceiling would not be frozen by the limit in effect at the time of death, but would be adjusted upwards, as time passed, in accordance with the new limit prescribed for each period.

The beneficiaries appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the Longshoremen's Act (33 U.S.C. (Supp. V) 921(b)(3)), but the Board did not reach the substantive question; it vacated the deputy commissioner's decision on the ground that the 1972 amendment to Section 19(d) of the Act (33 U.S.C. (Supp. V) 919(d)) had deprived the deputy commissioner of authority to resolve any contested issue even if no evidentiary hearing was necessary. *Rasmussen* v. *Geo Control, Inc.*, BRB No. 132–73, decided December 6, 1973.

The dispute then came before an administrative law judge, who rejected the OWCP's construction and sustained the survivors' position that the weekly rate of death benefits under the Longshoremen's Act is subject to no maximum limitation (App. C, *infra*, pp. 27A–74A).

The Director of the OWCP and the employer and insurer appealed to the Benefits Review Board, which

affirmed the administrative law judge's decision (App. B, *infra*, pp. 15A–25A). The Board acknowledged the "apparent incongruity" of having a ceiling on the weekly benefits payable to a permanently totally disabled worker but no limitation on the rate of compensation payable to the surviving family should the worker die (*id.* at 18A). Nevertheless, following the administrative law judge's analysis of the legislative history of the 1972 amendments to the Longshoremen's Act benefits structure, the Board concluded that "elimination of the maximum benefit provision from Section 9(e) of the Act * * * was done consciously and intentionally" (*id.* at 22A), and "that failure to substitute a new maximum was * * * a deliberate action" (*id.* at 22A–23A). The Board agreed with the administrative law judge's construction of Section 6(d), limiting its effect on death benefits to the annual upgrading of payments at the *minimum* level established by amended Section 9(e) (*id.* at 23A).

The Director and the employer and insurer sought review by the court of appeals under Section 21(c) of the Act (33 U.S.C. (Supp. V) 921(c)). The court of appeals affirmed the Board's decision, generally following its reasoning (App. A, *infra*, pp. 1A–14A). The court found that Section 6(d) is no more than an ambiguous indication that the Section 6(b)(1) limitations apply to death benefits (*id.* at 7A–8A and n. 5), while Section 9(e) is an unambiguous indication,

shown by its legislative history not to have been inadvertent, that death benefit rates are subject to no upper limits (*id.* at 8A–11A). The characterization of the effect of Section 6(d) in the Congressional Committee reports was found to be "overwhelmingly outweighed by the contrary purport of the legislative history as a whole" (*id.* at 8A, n. 5). The "premium on death" represented by the absence of a maximum weekly rate, the court found, "does appear to have its advocates" (*id.* at 11A–12A and n. 8), and is reflected as well in the difference between the *minimum* limitations of Section 6(b)(2) and Section 9(e) (*id.* at 13A–14A and n. 9).

REASONS FOR GRANTING THE WRIT

1. Two other circuits have considered the Board's decision in this case, on review of other cases in which the Board adhered to it; each, independently, disagreed with the Board and adopted the Director's administrative construction. *Director, Office of Workers' Compensation Programs* v. *O'Keefe*, 545 F. 2d 337 (C.A. 3); *Director, Office of Workers' Compensation Programs* v. *Boughman*, 545 F. 2d 210 (C.A. D.C.).

The court of appeals in this case acknowledged its direct conflict with those decisions, but relegated them to a footnote (App. A, *infra*, p. 14A and n. 10), as it did Section 6(d) and the Congressional Committee's reports describing the effect of that provision (*id.* at 7A and n. 5). The court had full opportunity to consider the decisions of the other courts of appeals, and they in turn had fully considered the position of the Board (and of the administrative law judge) in this

case, the reasoning of which was followed here. The conflict is thus not likely to be resolved without the aid of this Court.[3]

2. To be sure, the number of cases affected by the question is relatively small. Since October 1, 1975, when the Section 6(b)(1) limitation became 200 percent of the national average weekly wage, death-benefits awards involving more than one beneficiary are affected only when the deceased employee's average weekly wage was more than three times the national average, and single-beneficiary cases only when it was greater than four times the national average. These number some five a year.

On the other hand, there remain about forty cases in which death occurred in the first three years after passage of the 1972 amendments, when the ceilings were lower. Although very few of those cases have entered formal litigation (because the insurers have been responsible for and have paid benefits at least up to the Section 6(b)(1) maximum), the question of addi-

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[3] The present position of the Benefits Review Board is not clear. In *Dolan* v. *United Brotherhood of Carpenters & Joiners*, 7 BRBS 377, petition for review pending, C.A. 4, No. 78–1160, decided two days before issuance of the court of appeals' decision in this case, the Board withdrew from the position it had adopted here, acquiescing in the construction given Section 6(d) by the District of Columbia and Third Circuits. The Board may revert to its earlier position in light of the judicial approval it has now received; no case is now pending before the Board calling for the choice to be made. In any event, however, the Court of Appeals for the Ninth Circuit, having expressly disclaimed reliance on administrative construction (App. A, *infra*, p. 7A), is unlikely to follow the Board in any change of view.

tional compensation remains to be decided and will be governed by the outcome of this case. They cannot be compromised (see *S. H. Du Puy* v. *Director, Office of Workers' Compensation Programs,* 519 F. 2d 536 (C.A. 7), certiorari denied, 424 U.S. 965), and if the conflict among the circuits is not resolved, each of these cases will proceed at least to the appropriate court of appeals, and probably will be brought to this Court on petition for certiorari regardless of its disposition there.

The sums involved are not inconsiderable. Although the amount at stake in this case—more than $300,000—is somewhat unusual, many of the other pending disputes implicate substantial additional awards. Moreover, the mere potential of very high recoveries in death cases will significantly affect insurance rates and may imperil some small enterprises which, unable to afford Longshoremen's Act insurance, would be required to cease operations. See Section 32 of the Act, 33 U.S.C. 932.

3. In our submission, the decision below is erroneous. What the court has held is that, unlike cases of disability, when a covered worker dies there is no absolute ceiling on the weekly benefits payable to his dependents. The only limits recognized by the court are those fixed as a percentage of the wages of the deceased by Section 9 (*supra,* pp. 5–6). We submit, on the contrary, that Section 6(d) (*supra,* p. 5) makes applicable to death cases, like all others (albeit with a slight difference as we explain in a moment), the absolute ceilings announced by Section 6(b)(1)

(*supra,* p. 4)—now 200 per cent of the national average weekly wage.

We believe the court's result is at odds with the language of the statute, its legislative history and what may be assumed to have been the congressional intent to avoid disparate treatment.

First, the reasoning of the Board and of the courts of appeals makes Section 6(d) of the Act meaningless. That provision refers to "determinations"[4] and says that these "shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits." In the court's view, this means only that "the applicable * * * weekly wage" spoken of in Section 9(e) (*supra,* p. 6)—and there made the minimum "base" wage used in calculating death benefits—shall be the current national wage determined annually by the Secretary of Labor under Section 6(b)(3) (*supra,* p. 5). But this is already made clear by Section 10(f) of the Act (33 U.S.C. (Supp. V) 910(f)) for all cases of permanent total disability and death. If Section 6(d) does no more than announce that the minimum benefits in such cases shall be governed by these annual computations, it is entirely superfluous.

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[4] There are no "[d]eterminations under" Section 6(d) itself; all have agreed that "this subsection" in amended Section 6(d) of the Act refers to Section 5(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1252–1252—and hence to Section 6(b)–(d) of the Act. *Director, Office of Workers' Compensation Programs* v. *O'Keefe, supra,* 545 F. 2d at 344; *Director, Office of Workers' Compensation Programs* v. *Boughman, supra,* 545 F. 2d at 215. Cf. App. A, *infra,* pp. 7A–8A, n. 5.

In our submission, the true scope of Section 6(d) is made clear in the legislative history of the 1972 amendments, which the court misread. To be sure, Section 9(e) was deliberately written to eliminate a limitation based on the amount of the employee's *actual* wages that would be considered. But the provision is wholly silent on our question: whether the ceiling imposed by Section 6(b)(1) on the *benefit rate* applies in death cases. That is resolved by the Committee reports (S. Rep. No. 92–1125, 92d Cong., 2d Sess. 5 (1972); H.R. Rep. No. 92–1441, 92d Cong., 2d Sess. 3 (1972)):

> To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in [to the ultimate new maximum weekly benefit rate of 200 per cent of the national average weekly wage], their compensation is to be increased as the ceiling moves to 200 percent.

This explains that, by virtue of Section 6(d), the ceilings apply in a special way to cases of permanent total disability and death. Unlike the compensation for lesser degrees of disability, the minimum rate of benefits for permanent total disability and death is not frozen: it is always to be the specified percentage of the workers' pre-injury wages, adjusted under Section 10(f), subject only to the Section 6(b)(1) limitation *currently* in effect—not that determined for the period during which the injury or death occurred.

Finally, the decision fails to suggest any rational basis for a congressional discrimination against the totally disabled in favor of the survivors of a deceased employee.[5] We share "the commonsense conviction" expressed by the Court of Appeals for the District of Columbia Circuit (*Boughman, supra,* 545 F. 2d at 213) that:

> Congress did not intend to provide, without ever so stating and in sharp contradistinction to every previous version of the Act, that a totally disabled employee, in need of continuing care, should be compensated less generously than the family of an employee who dies. It is hardly within the policy of this Act to place a premium on death. [Footnote omitted.]

[5] It is true, as the court noted, that an argument for considering restoring a larger fraction of lost wages in death cases is discussed in the *Report of the National Commission on State Workmen's Compensation Laws* (1972). See p. 71 of the *Report* and App. A, *infra*, p. 12A, n. 8. But that *Report* nowhere suggests that the absolute ceilings on benefits should be inapplicable or different in death cases. See *Report*, *supra*, at 37–38, 60–62, 64–65, 71–72.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1978.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-2038

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER-APPELLANT

vs.

GENEVIEVE O. RASMUSSEN AND WILLIAM C. RASMUSSEN, JR., RESPONDENTS-APPELLEES

No. 75-2172

GEO CONTROL, INC., AND NEW HAMPSHIRE INSURANCE COMPANY, PETITIONERS

vs.

GENEVIEVE O. RASMUSSEN AND WILLIAM C. RASMUSSEN, JR. (WILLIAM C. RASMUSSEN, DECEASED), RESPONDENTS

Decided January 20, 1978

OPINION

On Petition to Review a Decision of the United States Department of Labor Benefits Review Board

Before MERRILL and TRASK, *Circuit Judges,* and TAKASUGI,* ***District Judge***

*Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

MERRILL, *Circuit Judge:*

Petitioners seek review of a decision and order of the Benefits Review Board awarding compensation to respondents as survivors of a deceased employee covered by the Longshoremen's and Harbor Workers' Compensation Act.[1]

William C. Rasmussen, in 1973, was employed by petitioner Geo Control, Inc., as hydrologist under a public work contract between Geo Control and the United States. His average weekly wage was $798. His employment was covered by the Defense Base Act, 42 U.S.C. §§ 1651, *et seq.*, which incorporates the Longshoremen's and Harbor Workers' Compensation Act (the Act), and Geo Control's liability for compensation under the Act was covered by insurance provided by petitioner New Hampshire Insurance Co.

On May 11, 1973, Rasmussen, while in the course of his employment by Geo Control in Vietnam, received fatal injuries while traveling as a passenger in a motor vehicle which triggered a land mine explosion. Respondent Genevieve O. Rasmussen is his surviving widow and is entitled to death benefits under the Act. Respondent William C. Rasmussen, Jr., is his surviving son and is entitled to benefits until his 18th birthday, or, if he qualifies under the Act as a student, until his 23d birthday.

A dispute arose as to the amounts of compensation to which respondents were entitled. In due course a

[1] The Act, 33 U.S.C. §§ 901, *et seq.*, provides certain defined workers with compensation for disability and death suffered in the course of their employment. Section 919 provides for hearings on claims for compensation to be conducted by administrative law judges. Section 921(b) establishes a Benefits Review Board, authorized to hear and determine appeals from orders entered by administrative law judges. Section 921(c) provides for judicial review by the courts of appeals of orders of the Benefits Review Board.

hearing was had before an administrative law judge, and on October 24, 1974, the judge ordered petitioners Geo Control and New Hampshire Insurance Co. to pay to Mrs. Rasmussen from May 11, 1973, and continuing during her widowhood the sum of $399 a week, being 50 percent of her husband's average weekly wage at the time of his death. The judge further ordered those petitioners to pay the son, from May 11, 1973, until his 23d birthday, unless his status as student terminated earlier, the sum of $137 a week, being 16⅔ percent of the average weekly wage of the deceased. Appeals from that order were taken to the Benefits Review Board. The board sustained the decision of the administrative law judge and these petitions for review followed. Joining Geo Control and New Hampshire Insurance Co. in petitioning for review is the Director, Office of Workmen's Compensation Programs, United States Department of Labor.

Under the Act, compensation for death is provided by 33 U.S.C. § 909. Compensation for disability is covered by §§ 906 and 908. All three of these sections were substantially amended in 1972 to give disabled persons and survivors increased benefits and protection against continuing inflation. A problem in statutory construction is presented by the contention that the provisions for disability and those for death, as amended in 1972, are inconsistent with each other.

Prior to the amendments, § 908(a) and (b) provided for total disability payments of 66⅔ percent of the worker's average weekly wage during the course of disability.[2] Section 906(b) provided limitations on

[2] In an effort to simplify an extremely complex problem of statutory construction, irrelevant detail, elaboration and exceptions are ignored, and the statute and statutory scheme are discussed in general terms.

the disability payments: a maximum of $70 and a minimum of $18. With respect to death benefits § 909 (b) of the Act provided surviving spouses with benefits during widowhood or dependency amounting to 35 percent of the average weekly wage, plus 15 percent for each surviving minor child, with the total not to exceed 66⅔ percent of such wages. Section 909 (e) provided maximum and minimum compensation by setting limits on the weekly wage used to calculate the benefits:

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

33 U.S.C. § 909(e).

The 1972 amendments made no change in the disability payments provided by § 908 (a) and (b). The whole basis for the limitations imposed by § 906(b) on compensation for disability was changed, however. Instead of fixing a dollar maximum and minimum, limitations were fixed by reference to the national average weekly wage. Section 906(b)(2) fixed the minimum for total disability at not less than 50 percent of the national average (or, if it be a lesser amount, the employee's average weekly wage). Section 906(b)(1) provided a maximum for disability ultimately reaching 200 percent of the national average by October 1, 1975, but gradually attaining that figure by annual increases commencing at 125 percent during the period ending September 30, 1973. The manner in which the applicable national average weekly wage was to be determined was set forth in § 906(b)(3),

and the duty of making that determination was assigned to the Secretary of Labor.[3]

The section covering death benefits, § 909(b), was amended to increase the compensation to the surviving spouses to 50 percent of the deceased's average weekly wage and that of the minor children to 16⅔ percent, but retained the 66⅔ percent limit on the total amount payable. The section setting the minimum and maximum limitations, § 909(e), was amended to read:

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[3] Section 906(b), as amended in 1972, states:

"(b)(1) Except as provided in subsection (c) of this section, compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

"(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

"(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

"(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

"(D) 200 per centum beginning October 1, 1975.

"(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

"(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972."

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

33 U.S.C. § 909(e). It is the construction of that subsection with which we are concerned.

Taken literally, the amendment of the subsection does two things. First, consistently with the provisions for limitations on disability compensation in § 906(b) (1) and (2), the minimum compensation for death benefits was fixed by reference to the national average weekly wage instead of by specific dollar amounts as in the original Act. Second, unlike § 906 (b), however, and unlike the original Act, while a minimum limitation on the average weekly wage was provided, no maximum was provided.[4]

The result is that for death compensation can be more liberal than for disability—that should a disabled person die his widow could realize an increase in compensation over that received prior to death. As one court has commented, it puts "a premium on death" to provide "that a totally disabled employee, in need of continuing care, could be compensated less generously than the family of an employee who dies."

[4] There still are limits on compensation but they are only those in § 909 (b), (c) and (d), which provide that "the total amount payable shall in no case exceed 66⅔ per centum of such wages," and that in § 906(e), which provides that where the national average weekly wage is used to calculate the compensation, the compensation may not exceed the weekly wage of the deceased, and thus places a maximum on the minimum compensation. (The appropriate percent of the national average weekly wage, which is to operate as minimum, cannot exceed the actual weekly wage.)

Director, Office of Workers' Compensation Programs v. *Boughman*, 545 F. 2d 210, 213 (D.C. Cir. 1976).

The Director, Office of Workers' Compensation Programs, has taken the position since 1972 that to avoid this anomaly § 909(e) must be construed to incorporate the maximum limitations provided by § 906 (b)(1). This is the position he took in this matter before the administrative law judge and the Benefits Review Board, and which both judge and board rejected.

In support of that position petitioners rely on certain instances in the Act and in legislative history in which employees and survivors are linked together in such a way as to suggest that certain provisions of the Act apply to both disability and death compensation.[5] These instances, having reference to

[5] First, they refer to § 906(d), which reads: "Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." We read the "determinations" there mentioned as having reference to those provided for by § 906(b)(3) (*see* n. 3)—determinations by the Secretary of the applicable national average weekly wage. These determinations are not confined to cases of disability. The amendment of § 909(e) specifically embraced them by providing, as the minimum death benefit, a percent of "the national average weekly wage as prescribed in section 906(b) of this title * * *."

As for § 906(d), all it says is that the Secretary's determination of national average weekly wages with respect to a certain period shall not only apply to those who first begin receiving compensation during that period, but shall also apply to those who are already receiving benefits. This provision rationally relates to those receiving death, as well as disability, compensation. We do not regard as significant the fact that Congress chose to put the substance of this subsection, relating to both survivors and dis-

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language far from clear or precise, do not in our judgment cast light on the legislative intent.

The difficulty with petitioners' position is that on its face the language of § 909(e) is not ambiguous. Their position rests on an assumption that the choice of this unambiguous language by Congress, and its failure expressly to incorporate the maximum limitations of § 906(b)(1), was inadvertent—that Congress had not meant to say what it had clearly said. The presumption to the contrary is not lightly to be overturned, and in our judgment petitioners have failed to meet their burden in this respect. Indeed, legislative history as recited at length in the 39-page Decision and Order of the administrative law judge in our view convincingly demonstrates that Congress was

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abled employees, in a section that has principal reference to disability. Given the clear, limited meaning of § 906(d) it cannot be read as incorporating into § 909, dealing with death benefits, the limitations of § 906(b)(1), which refer specifically to compensation for disability.

The Director also relies on language appearing in both Senate and House Reports and in remarks of a senator from the floor of the Senate: "To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase in, their compensation is increased as the ceiling moves to 200%."

The phase-in to which reference is made is the gradual annual increase from 125 percent to 200 percent of the national average provided by § 906(b)(1). The language thus suggests that the gradual increase in the maximum limitations provided by that subsection should apply to survivors as well as to disabled employees. This is, indeed, ambiguous. However, as we later discuss in the text of our opinion, as an indication of legislative intent it is overwhelmingly outweighed by the contrary purport of the legislative history as a whole.

fully aware of what it was doing and that the absence of maximums in § 909 was not inadvertent.

From the outset, one of the controversial questions presented in connection with the amendment of the Act had to do with the elimination of the maximum limitations. Two bills were presented in the Senate: S. 2318 eliminated the maximum limits as to both disability and death benefits;[6] S. 525 increased the benefits but retained maximum limitations. *Hearings, supra* n. 6, at 15, 19. The two bills were vigorously debated, both on the floor of the Senate and by witnesses in Senate hearings. Representatives of labor testified at length in support of S. 2318 to the effect that it would "eliminate the artificial and totally unrealistic restrictions on benefit amounts." *Hearings, supra* n. 6, at 156–57. Time after time, senators and representatives speaking on the bills and witnesses testifying thereto pointed out that § 10(d) of S. 2318, amending § 909(e) of the Act, would eliminate the maximums on compensation (save the 66⅔ percent of the deceased's actual average weekly wage). *See* Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S. 2318, Public Law 92–576) prepared by the Subcomm. on Labor of the Comm. on Labor and Public Welfare, U.S. Senate, Dec. 1972. Time after time, the Senate Report and the House Report, in summarizing major provisions of the bill and in section-

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[6] *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare on S. 2318, and S. 525, and S. 1547*, 92d Cong., 2d Sess. 6, 8 (hereinafter cited as *Hearings*).

by-section analyses, pointed out this effect of § 10(d) of S. 2318.[7]

The Senate Report, in compliance with subsection 4 of Rule XXIX of the Standing Rules of the Senate, showed the changes in existing law made by the bill as follows, with existing law proposed to be omitted enclosed in brackets and new matter printed in italics:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor] less than [$27] *the applicable national average weekly wage as prescribed in section 6(b)* but the total weekly [compensation] *benefits* shall not exceed the *average* weekly wages of the deceased.

S. Rep. No. 1125, supra n. 7, at 40. The House Report, in compliance with Rule XIII of the Rules of the House of Representatives, showed the change in § 9(e) as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased] *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*

H.R. Rep. No. 1441, supra n. 7, at 37.

It is difficult to see how, in light of this history and the manner in which the extent of the amendment was graphically illustrated, it can be maintained that Congress was unaware of the fact that while maximum limitations were imposed as to disability benefits they were eliminated as to death benefits.

It is argued, however, that no matter what the record may show the result is so irrational that it simply cannot have been intended. We cannot agree. One may well believe that dispensing with maximum limitations in the case of death benefits while retaining them in the case of disability is not the wisest legislative choice. As a choice, however, it clearly has received recognition and it does appear to have its advocates, and thus would seem to be entitled to the respect regularly accorded to a course legislatively chosen. As quoted by the administrative law judge, a report of the National Commission on Workmen's Compensation Laws, while favoring equality of benefits, recognizes that arguments have been advanced in favor of dispensing with maximum limitations in the case of death while retaining them for disability. The argument is to the effect that any limitation is undesirable, that reasons for imposing such limits in the case of disability (other than economy) do not exist in the case of death, and that the cost of fully compensating for death would be relatively small.[8] *See* The Report of the National Commission on State

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[7] S. Rep. No. 1125, 92d Cong., 2d Sess. 6, 22 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 4, 19, *reprinted in* [1972] U.S. Code, Cong. & Ad. News 4698 at 4701, 4716. As one example, the section-by-section description of the amendment in the House Report states: "Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased." H.R. Rep. No. 1441, at 19.

Workmen's Compensation Laws, at 71 (1972). The legislative choice thus can be read as a compromise with the course sought by representatives of labor: the elimination of maximum limits across the board.

Finally we note that had Congress intended death benefits to have the same limitations as disability benefits it would have been extremely simple to make the limitations provisions applicable to both. Instead Congress deliberately chose to compute limitations in the two cases by entirely different methods. For disability the limitations of § 906(b)(1) and (3) are imposed directly upon the compensation awarded. For death the limitation of § 909(e) is imposed upon the figure from which compensation is to be computed.

This choice of Congress—to fix limitations in the two cases by different language and different meth-

[8] The portion of the report to which the administrative law judge refers states:

"Work-related deaths account for less than one percent of all workmen's compensation claims and less than 10 percent of all benefits. As the ultimate tragedy, work-related death deserves full compensation. The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program.

* * * * *

"* * * In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivational problems, which suggests that replacement of more than the normal 66⅔ percent of loss wages is appropriate." The Report of the National Commission on State Workmen's Compensation Laws, at 71 (1972).

ods—actually serves to extend the advantage of death over disability beyond that realized from the elimination of maximum limitations. By the manner in which *minimum* limitations respectively are fixed, death benefits (in a case where the deceased is survived by a spouse and one or more children) have been rendered superior to disability benefits as to some employees (those whose average weekly wages are less than the national average but greater than one half the national average).[9]

[9] The following examples indicate how the provisions governing minimum compensation for death and disability differ in hypothetical calculations:

If we assume the Secretary has determined that the applicable national average weekly wage is $100, the compensation for an employee whose actual average weekly wage was $60 would be determined as follows:

1. *Total Disability Benefits*

Under § 908(a) the employee would normally receive 66⅔ percent of his average weekly wage, or $40. However, § 906(b)(2) states that the minimum compensation shall be 50 percent of the national average weekly wage, or $50. An employee in this situation would receive $50 compensation for total disability.

2. *Death Benefits*

Under §909(b), if, for example, the employee is survived by a widow or widower and one or more children, the total amount payable is 66⅔ percent of the average weekly wage of the deceased, or $40. However, § 909(e) states that where the average weekly wage is less than the national average weekly wage, the national average should be used in place of the employee's actual average, and here we should take 66⅔ percent of $100, or $66.66. § 909(e) then limits this minimum compensation to the actual average weekly wage, so the survivors would receive $60 compensation.

Making these same assumptions, the minimum compensation calculations for employees with average weekly wages greater than half the national average weekly wage and less than the national

If we are to bring disability and death benefits into a state of consistency we must, then, do more rewriting of § 909(e) than simply incorporating into it a form of the phase-in of § 906(a)(1). We must also rewrite the minimum limitations.

This course we reject. Where Congress has chosen to articulate limitations in the two cases by wholly different language, establishing different methods for computation, we find little rational persuasion in an argument that it must nevertheless have intended the results to be the same.

We conclude that petitioners have failed to meet their burden of establishing that Congress did not knowingly and intentionally eliminate the maximum limitations on death benefits in § 906(e). We must respectfully disagree with two decisions rejecting the decision of the Benefits Review Board in this matter and holding in accordance with the views of the Director.[10]

The judgment of the Benefits Review Board is affirmed.

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average weekly wage result in greater compensation for death than disability, as the following chart indicates:

National average	Employee's average	Death benefits	Total disability
$100	$100	$66.66	$66.66
100	99	66.66	66.00
100	75	66.66	50.00
100	60	60.00	50.00
100	51	51.00	50.00
100	50	50.00	50.00

[10] *Director, Office of Workmen's* [sic] *Compensation Programs* v. *Boughman*, 545 F. 2d 210 (D.C. Cir. 1976); *Director, Office of Workmen's* [sic] *Compensation Programs* v. *O'Keefe*, 545 F. 2d 337 (3d Cir. 1976).

APPENDIX B

BRB Nos. 74-204 and 74-204A

GENEVIEVE O. RASMUSSEN AND WILLIAM C. RASMUSSEN, JR. (WILLIAM C. RASMUSSEN, DECEASED), CLAIMANTS-RESPONDENTS

v.

GEO CONTROL, INC. AND NEW HAMPSHIRE INSURANCE COMPANY, EMPLOYER/CARRIER-PETITIONERS

Director, Office of Workers' Compensation Programs, United States Department of Labor, *Petitioner*

DECISION

Appeals from Decision and Order of William B. Devaney, Administrative Law Judge, United States Department of Labor.

John R. Coyle and Bernard B. Smyth (Ogden and Coyle), Washington, D.C., for claimants.

Edward J. Haniver, New York, New York, for employer-carrier.

Jean S. Cooper (William J. Kilberg, Solicitor of of Labor, Marshall H. Harris, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: WASHINGTON, Chairperson, HARTMAN and MILLER, Members.

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Washington, Chairperson:

These appeals seek review and modification of a Decision and Order (74-LHCA-118) of Administrative Law Judge William B. Devaney in which death benefits were awarded to the claimants. The claim in question was filed pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act), as made applicable to employment at certain defense base areas by the Defense Base Act, 55 Stat. 622, as amended, 42 U.S.C. § 1651 *et seq.*

The facts in this case are not in dispute and were stipulated by the parties. The decedent was employed as a hydrologist by the employer in Vietnam under a public works contract with the United States. On May 11, 1973, while traveling as a passenger in a jeep, Rasmussen sustained fatal injuries from a land mine explosion. At the time of his fatal accident, the decedent was performing services for the employer and his death arose out of and in the course of his employment. The decedent's average weekly wage was $798.00.

The claimants are the decedent's surviving widow and minor son. There is no question that they are entitled to receive death benefits pursuant to Section 9(b) of the Act, 33 U.S.C. § 909(b). The carrier commenced payment of death benefits to the claimants voluntarily at a rate of $167.00 per week, which it believed to be the statutory maximum. On October 17, 1973, the carrier stopped paying the son's share because he had reached his eighteenth birthday, and reduced the widow's benefit to $133.00 per week. Despite written direction from the deputy commissioner, the carrier failed to correct the widow's benefits up to the $167.00 per week rate, which the deputy commissioner also believed to be the statutory maximum. The carrier apparently suspended all payments on April 11, 1974, nine days after the formal hearing before the administrative law judge.

The administrative law judge awarded the widow death benefits based on fifty percent of the decedent's average weekly wage, plus the cost of living adjustment and interest, pursuant to Sections 9(b) and 10(f) of the Act, 33 U.S.C. §§ 909(b), 910(f). The decedent's son was awarded benefits based on 16⅔ percent of the decedent's average weekly wage, plus the cost of living adjustment and interest, pursuant to Sections 9(b) and 10(f) of the Act, 33 U.S.C. §§ 909(b), 910(f). An additional award was made of a ten percent penalty on the difference between the amounts due and paid during the period from October 17, 1973, to April 15, 1974, pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e). In addition, the claimant's attorney, a federal government employee acting with permission of his agency, was awarded a fee, subject to several express conditions.

In these appeals, the employer and carrier and the Director, Office of Workers' Compensation Programs, contend that death benefits awarded pursuant to Section 9 of the Act are limited by the maximum weekly amount provided for disability benefits in Section 6(b)(1). 33 U.S.C. §§ 906(b)(1), 909. The employer and carrier also argue that six percent interest and a ten percent penalty should not have been awarded.

The clear language of Section 9(b) of the Act, 33 U.S.C. § 909(b), provides the method of computation of death benefits and prescribes the maximum amount payable.

> * * * [T]he total amount payable shall in no case exceed 66⅔ per centum of such [average weekly] wages. * * *

Prior to amendment of the Act in November 1972, Section 9(e), 33 U.S.C. § 909(e), had provided both a maximum limit and a minimum limit in computation of death benefits. The maximum provided was, in effect, $70.00 per week, the same maximum limit prescribed by Section 6(b), 33 U.S.C. § 906(b), for disability payments at that time. However, in amending the Act, Congress eliminated the maximum and retained only a minimum limit. Section 9(e) now reads as follows:

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased. 33 U.S.C. § 909(e).

Elimination of the provision limiting the maximum amount payable in death benefits to the same figure provided for disability compensation creates an anomalous situation. If an employee were rendered permanently, totally disabled by an employment-related accident, his maximum compensation would be limited by the provisions of Section 6(b)(1) of the Act, 33 U.S.C. § 906(b)(1), no matter what his actual average weekly wage was. If the same employee subsequently died, or if he had been killed outright in the accident, his survivors could be entitled to a larger sum in death benefits than was payable in disability compensation.

Given this apparent incongruity, the Board finds it appropriate to look beyond the plain language of

the statute and consider persuasive evidence of legislative intent. *Boston Sand and Gravel Co.* v. *United States,* 278 U.S. 41 (1928). We are mindful that in construing a statute, the intent of Congress is to be ascertained and given effect. *United States* v. *N.E. Rosenblum Truck Lines, Inc.,* 315 U.S. 50 (1942). However, in construing a statute, a court must construe what Congress has written and may neither add, subtract, delete nor distort words used. *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States,* 340 U.S. 593 (1951). Moreover, although consistent administrative construction of a statute is entitled to great weight in interpreting the statute, *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972), a court need not defer to the administrative construction when there are compelling indications that it is wrong, *Espinoza* v. *Farah Manufacturing Co., Inc.,* 414 U.S. 86 (1973). Where the words of a later statute differ from those of a previous one on the same or related subject, the legislature must have intended them to have a different meaning. *Klein* v. *Republic Steel Corp.,* 435 F. 2d 762 (3d Cir. 1970). Finally, where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded. *J. Ray McDermott and Co.* v. *Vessel Morning Star,* 457 F. 2d 815 (5th Cir. 1972), *cert. denied sub nom, Fish Meal Co.* v. *J. Ray McDermott and Co.,* 409 U.S. 948 (1972).

In his Decision and Order in this case, the administrative law judge exhaustively analyzed the applicable provisions of the Act and the relevant legislative history. Having reviewed that Decision and Order in light of the principles enumerated in the preceding paragraph, the Board concludes that the administra-

tive law judge correctly determined that the maximum limit on disability compensation according to the provisions of Section 6(b)(1) of the Act does not apply to death benefits awarded under Section 9(b). 33 U.S.C. §§ 906(b)(1), 909(b).

The Report of the Senate Committee on Labor and Public Welfare, which described the major provisions of the bill amending the Act, discussed maximum and minimum benefit amounts. With reference to survivor benefits, the report states,

> "* * * The amended Act will provide a fifty percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages.
>
> * * * * *
>
> "A minimum death benefit tied to the applicable national average weekly wage, but not to exceed the employee's average weekly wage is also provided." S. Rep. No. 92–1125, 92d Cong., 2d Sess. 6 (1972).

In its section-by-section analysis of the bill to amend the Act, the Senate Committee referred to the amendment creating a new Section 6(b)(1), 33 U.S.C. § 906(b)(1), only in terms of compensation for disability; death benefits were not referred to either specifically or by implication. The pertinent section reads,

> *Section 5(a)* [of the bill] amends the Act by deleting subsection 6(b) and substituting new sections (b), (c) and (d). Subsection (b)(1) states that, except as provided in subsection (c), compensation for disability may not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3). * * * S. Rep. No. 92–1125, 92d Cong., 2d Sess. 17 (1972).

In its discussion of death benefits, the Senate Committee indicated no intent to apply the maximum amount for disability compensation provided in Section 6(b)(1) to death benefits provided by Section 9(b). 33 U.S.C. §§ 906(b)(1), 909(b). The report merely states that,

> *Subsection 10(b)* [of the bill] amends Section 9 (b) and (c) to increase all 35 percent shares of death benefits therein to 50 percent and all 15 percent shares to 16⅔ percent. S. Rep. No. 92–1125, 92d Cong., 2d Sess. 21 (1972).

It is clear that Congress did intend to relate the *minimum* disability compensation provided by Section 6(b)(1), 33 U.S.C. § 906(b)(1), to death benefits. Both the language of the Act and the legislative history make this apparent. In the legislative history, it is stated that,

> *Section 10(d)* [of the bill] amends section 9(e) to provide that in computing death benefits the employee's average weekly wage shall be considered as not less than the national average weekly wage. However, maximum weekly death benefits could not be more than the employee's average weekly wages. S. Rep. No. 92–1125, 92d Cong., 2d Sess. 22 (1972).

However, no reference is made to application of the Section 6(b)(1) maximum to death benefits. 33 U.S.C. § 906(b)(1). The former provision in Section 9(e), 33 U.S.C. § 909(e), which set a maximum amount on death benefits, was eliminated from the amendment. In the absence of any evidence to the contrary, we must conclude that elimination of the maximum provided for disability cases from death benefits cases was intentional. The maximum limit on death benefits is provided in Section 9(b), 33 U.S.C. § 909(b),

and relates solely to the employee's actual weekly wages.

The summary of principal amendments in the Report of the Committee on Education and Labor of the House of Representatives closely parallels the Senate Report. It is, therefore, unnecessary to discuss those provisions of that Report. They are merely cumulative of the indication of legislative intent contained in the Senate Report. Pertinent comments are contained in the "Summary of Major Provisions of the Bill." H.R. Rep. No. 92–1441, 92d Cong., 2d Sess. 2–4 (1972).

In its "Section by Section Description of Committee Amendment to the Bill", the House Report contains language which indicates that elimination of the maximum benefit provision from Section 9(e) of the Act, 33 U.S.C. § 909(e), was done consciously and intentionally.

> Subsection (d) of this section amends Section 9(e) of the Act, eliminating the dollar minimum and maximum set out under present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in Section 6(b) of the Act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased. H.R. Rep. No. 92–1441, 92d Cong., 2d Sess. 19 (1972).

This language suggests that the Committee was aware that both the maximum and minimum benefit provisions were being eliminated from the old Act and that only a revised minimum benefit was substituted. There is no evidence whatever to suggest that failure to substitute a new maximum was anything other than a deliberate action.

It is argued that Section 6(d) of the amended Act refers to both maximum and minimum benefits payable under Section 9 so that both the maximum and minimum compensation payable under Section 6(b) also apply to death benefits awarded pursuant to Section 9. 33 U.S.C. §§ 906(b), 906(d), 909. Section 6(d) reads as follows:

> Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period. 33 U.S.C. § 906(d).

The administrative law judge found that this provision refers only to minimum benefits. The Director argues that this provision can be reasonably construed only if it refers to both maximum and minimum benefits, because the redetermined national average weekly wage does not apply to survivors currently receiving benefits. However, Section 10(h) of the Act, 33 U.S.C. § 910(h), provides for an upward adjustment of death benefits for persons currently receiving such benefits, calculated with reference to the redetermined national average weekly wage. Therefore, the Board finds that the administrative law judge correctly construed Section 6(d) as applying only to minimum benefits. 33 U.S.C. § 906(d).

The employer and carrier contend that interest should not be assessed against them on the unpaid portion of weekly compensation as each installment became due, dating from May 11, 1973, until the date paid. This Board has held that assessment of six per-

cent interest on past due payments of compensation is mandatory. *Ryan* v. *McKie Co.*, 1 BRBS 221, BRB Nos. 74–160 and 160A (December 10, 1974). The administrative law judge correctly assessed interest in this case.

The employer and carrier further protest the assessment of a ten percent penalty, pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e), against them for failure to pay the correct installment of compensation due without an award from October 17, 1973, until April 15, 1974. In a recent decision, the Board has held that such a penalty is mandatory in the absence of timely notice of controversion filed pursuant to Section 14(d), or of evidence in the record indicating that failure to make such payments was beyond their control. *McCabe* v. *Ball Builders, Inc.*, 1 BRBS 290, BRB No. 74–181 (January 31, 1975). In this case, the administrative law judge correctly assessed the penalty against the carrier on the difference between the amount paid and the amount the deputy commissioner directed to be paid, rather than on the difference between the amount paid and the full amount actually due. The deputy commissioner, acting erroneously, but in accordance with LS/HW Program Memorandum No. 42, entitled "Legal Opinion Regarding Maximum Death Benefits Payable Under LS/HWCA", issued by the Office of Workmen's [Workers'] Compensation Programs on September 20, 1973, ordered payment of death benefits in an amount equal to the statutory maximum for disability compensation. The employer and carrier's incorrect interpretation of Section 9(b) of the Act, 33 U.S.C. § 909(b), confirmed by the deputy commissioner, should not be held against them except to the extent that they failed to pay the maximum amount directed by the deputy commissioner.

The claimant's attorneys have requested that a fee be awarded to them and against the carrier for services rendered in proceedings before this Board, pursuant to Section 28(b) of the Act, 33 U.S.C. § 928(b). A complete statement of the extent and character of necessary work done has been submitted in accordance with the Board's regulations. 20 C.F.R. §§ 702.132, 802.203. The Board finds that a fee of $3000 is appropriate in this case and hereby approves an award of that sum against the carrier, pursuant to Sections 28(b) and (c) of the Act, 33 U.S.C. §§ 928(b), (c).

The Decision and Order of the administrative law judge is hereby affirmed in all respects.

/s/ Ruth V. Washington
RUTH V. WASHINGTON,
Chairperson.

We Concur:

/s/ Ralph M. Hartman
RALPH M. HARTMAN,
Member.

/s/ Julius Miller
JULIUS MILLER,
Member.

Dated in Washington, D.C. this 3d day of April 1975.

APPENDIX C

IN THE MATTER OF GENEVIEVE O. RASMUSSEN, AND WILLIAM C. RASMUSSEN, JR., (WILLIAM C. RASMUSSEN, DECEASED), CLAIMANTS

AND

GEO CONTROL, INC., EMPLOYER

AND

NEW HAMPSHIRE INSURANCE CO., CARRIER

Case No. 74-LHCA-118

(Formerly 15-11022)

Nicholas E. Karatinos, Esq., 16102 Pond Meadow Lane, Bowie, Maryland 20715, for the Claimants

Edward J. Haniver, Esq., New Hampshire Insurance Company, c/o AIU Corporation, 102 Maiden Lane, New York, New York 10015, for the Employer and Carrier

Jean S. Cooper, Esq., U.S. Department of Labor, 14th & Constitution Avenue, N.W., Washington, D.C. 20210, for the Government

Before WILLIAM B. DEVANEY, *Administrative Law Judge*

DECISION AND ORDER

STATEMENT OF THE CASE

William C. Rasmussen, a civilian employee of Geocontrol, Inc. (hereinafter also "Employer"), died in South Vietnam as a result of a land mine explosion on May 11, 1973. The central issue in this case is the amount of death benefits payable under Section 9 of the Act.[1] The Employer and its insurance carrier, New Hampshire Insurance Company (hereinafter referred to as "Employer" unless otherwise indicated), and the Director, Office of Workmen's Compensation Programs (hereinafter also "Director") assert that the maximum limitation of Section 6 of the Act, 33 U.S.C. § 906, applicable to disability benefits, is also applicable to death benefits payable under Section 9 of the Act, 33 U.S.C. § 909. Claimant asserts that the maximum limitation on death benefits is determined solely by the provisions of Section 9 of the Act.

A hearing was duly held, pursuant to notice, in Washington, D.C. on April 2, 1974. Since the primary issue for resolution was the legal issue as to the weekly rate of compensation for death under the 1972 amendments to the Act, all parties were invited to file briefs prior to hearing, to present oral argument at the

[1] This is a claim under the Defense Base Act, 55 Stat. 622 as amended, 42 U.S.C. § 1651, *et seq.*, as amended, and, as made applicable thereby, the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*, as amended. Herein, the Longshoremen's and Harbor Workers' Compensation Act, to the extent made applicable by the Defense Base Act, is referred to as the "Act".

hearing, and to submit post hearing briefs.[2] All briefs and comments and the argument of all parties have been carefully considered.

Upon the entire record in this case, I make the following findings, conclusions, and order.

FINDINGS OF FACT

The facts are not in dispute, and the following have been stipulated by the parties (Joint Stipulation) as follows:

1. That on May 11, 1973, William C. Rasmussen (hereinafter referred to as "Employee") was in the employ of the Employer as a hydrologist, under a public work contract between the Employer and the United States, in South Vietnam, which is in the 15th Compensation District established under the provisions of the Defense Base Act; that said employment was covered by the Defense Base Act and, as made applicable thereby, the Act.

2. That the liability of the Employer for compensation under the Act was insured by the New Hampshire Insurance Company.

3. That on May 11, 1973, Employee, while performing services for the Employer and while travelling as a passenger in a jeep suffered his death as the result of fatal injuries sustained from a land mine explosion;

[2] Employer requested postponement of the hearing principally on the ground that the issue of the rate of benefits payable under Section 9 of the Act, as amended, was a case of first impression and of interest to the insurance industry. The motion was denied on March 28, 1974, by telegram, but leave was granted at that time until May 2, 1974, for the submission of additional, or supplemental, views or comments by the parties and by any person as *amicus curiae* having an interest in the matter herein involved.

and that the death arose out of and in the course of employment.

4. That Employee's average weekly wage was $798.00 per week.

5. That funeral and burial expenses exceeding $1,000.00 were incurred by Genevieve O. Rasmussen, surviving widow (hereinafter also sometimes referred to as "Widow" and, collectively with her son as "Claimants"); and that Employer is liable for funeral expenses in the statutory maximum amount of $1,000.00.

6. That Genevieve O. Rasmussen, who was born February 1, 1918, and married to the Employee on January 2, 1942, is the surviving widow of the Employee and, as such, she is entitled to death benefits in her own behalf beginning May 11, 1973, and continuing thereafter subject to the provisions of the Act.

7. That William C. Rasmussen, Jr. (hereinafter also referred to as "Son"), also known as William Charles Rasmussen, Jr., who was born on October 17, 1955, is the surviving child of the Employee and, as such, was entitled to death benefits beginning May 11, 1973, and continuing until his eighteenth birthday, October 17, 1973, and thereafter until his twenty-third birthday, October 17, 1978, if, and during, his qualification as a "student" as defined by the Act; that death benefits due on behalf of the Son shall be payable to Genevieve O. Rasmussen his mother and natural guardian.

8. That timely notice of claim was given to Employer.

In addition, the following facts are also undisputed:

9. Son was duly enrolled as a student in the 12th grade in the Overseas School of Rome, Via Cassia, 811, 00819 Rome, Italy, for the academic year 1973–

74, beginning September, 1973, (Cl. Exhs. 15, 16). Son was currently attending school at the time of the hearing, with expected graduation in June, 1974, and the parties stipulated that the Overseas School of Rome is an accredited high school within the meaning of the provisions of the Act (Tr. 24–25).

10. A policy of insurance for workman's compensation was issued by New Hampshire Insurance Co. (hereinafter individually referred to as "Carrier") (Cl. Exh. 1, pp. 2, 7). The policy was not offered in evidence; but correspondence, received in evidence without objection, states that the annual premium on Employee's policy was in excess of $1,800.00. (Cl. Exh. 1, pp. 49, 44). Form BEC–570–1 (Cl. Exh. 1, p. 2) recites that Policy No. 83–2 33 33, beginning April 10, 1973, and expiring April 10, 1974, named as employer Geocontrol, Inc. (William C. Rasmussen & Associates, Inc.)

11. Form BEC–206, entitled "Payment of Compensation Without Award", was filed by Carrier and was dated October 1, 1973 (Cl. Exh. 1, p. 41). Item 8 shows average weekly wage "$798.00". Following this, the form states "Multiplied by ½=compensation $" and Carrier inserted "167.00". Item 9 stated compensation will be paid from 5/11/73 and date of first payment, item 10, was shown as 10/1/73. Item 7 listed as names of injured or dependents of injured, to whom compensation will be paid: Genevieve O. Rasmussen and William C. Rasmussen, Jr.

12. On October 18, 1973, Deputy Commissioner Donald C. Reichart entered a Compensation Order and Award of Death Benefits (Cl. Exh. 1) which was subsequently set aside by the Benefits Review Board because issued in contravention of the adjudication procedure for contested issues. *Genevieve O. Rasmus-*

sen, et al., v. *Geocontrol Inc., et al.* BRB No. 132–73 (1973). The Award stated, in part, as follows:

> The employer * * * and the insurance carrier * * * shall pay death benefits to Mrs. Genevieve O. Rasmussen in her own behalf at the rate of 50 percent of the weekly wages of the employee and in behalf of William C. Rasmussen, Jr. at the rate of 16⅔ percent of the weekly wages, subject to a basic maximum amount payable in behalf of all beneficiaries of $167 per week, beginning May 11, 1973 and continuing subject to the limitations of the Act or until further ordered. * * * (Cl. Exh. 1).

13. By letter dated September 21, 1973 (Cl. Exh. 1, p. 40), Assistant Deputy Commissioner Reichart advised Carrier as follows:

> * * * the maximum weekly benefit being $167 (representing a combined rate of $125.25 in behalf of the widow and $41.75 in behalf of the child).[3]

[3] The basis for this compensation is set forth in LS/HW Program Memorandum No. 42, dated September 10, 1973 (Cl. Exh. 1, pp. 38–39), which provided, in part, as follows: "In cases where an employee is survived by a widow and one or more children, the total benefit payable is divided between the widow and the children, in spite of the fact that the widow's 50 percent of the deceased employee's wages alone exceeds the maximum. In such cases the death benefit would be divided to pay the widow three-fourths of the amount payable representing her share of the 66⅔ percent total. The remaining 16⅔ percent or one-fourth of the total would be paid to the child or children."

The computation: Widow's share=$167.00×75%=$125.25; children's share=167.00×25%=41.75.

Carrier's repeated assertion at the hearing that its computation of $125.25 for the widow's benefit was based on, "* * * the average national weekly wage of $250.50, you take a half of that, you've got $125.25. Then, you bring it up to $133 with the increase. But that's the maximum where there's a widow alone." (Tr. 40) (See, also, Tr. 33, 34, 35, 38, 39, 43) began with an erroneous figure. It is conceivable that Carrier was struggling for justification on the basis of the Wage Table, enclosure to OWCP Bulletin No. 1073, which shows as "allowable earnings" effective October 28, 1972 (not prior to amendment, see, ALJ Exh. 1) $250.50, which is the amount when multiplied by 66⅔% (Section 8 of the Act) would equal $167.00. In any event, Carrier's position was based on no provision of the Act as amended, its professed basis "national average weekly wage of $250.00" was totally erroneous (national average weekly wage for 1972 was $131.80, see enclosure to OWCP Bulletin No. 10–73); and its position is contrary to the provisions of Section 9 of the Act.

14. Effective October 17, 1973, Carrier ceased paying Son benefits because he had reached the age of 18 and, at the same time, reduced "the widow's portion to $125.25 per week" plus the cost of living increase required by Section 10(f) of the Act (6.49%) and "we come up with a total of $133.00 weekly, which we are presently paying." (Carrier's letter dated December 4, 1973, Cl. Exh. 11).

15. By letter dated December 5, 1973, Deputy Commissioner Reichart informed Carrier as follows:

> "The compensation due in this case *shall be paid in bi-weekly installments* * * * Adjust your interval for payment. Information has been received you are compensating Mrs. Rasmussen at a rate of $133 per week, rather than the $167 as awarded. Please correct this and advise." (Cl. Exh. 12.)

16. Despite the direction of the Deputy Commissioner to pay the benefits due in bi-weekly installments and that the amount due Mrs. Rasmussen was $167.00 per week, Carrier was, as of April 2, 1974,

despite instruction of counsel to correct the frequency of payment, still making monthly payments in the total amount of $133.00 (Tr. 44–45).

17. Carrier, by letter dated April 18, 1974, addressed to the undersigned (hereby incorporated as a part of the record as ALJ Exh. 3–A) enclosed a copy of Form BEC–208 entitled "Compensation Payment Stopped or Suspended" (hereby incorporated as a part of the record as ALJ Exh. 3–B) which recites that payments from 5/11/73 through 9/30/73 at the rate of $167.00 had been made to Widow and Son; and that payment from 10/1/73 through 4/11/74 at the rate of $178.00 ($167.00 plus adjustment pursuant to Section 10(f) of the Act) had been made to Widow and Son.

CONCLUSIONS

I. PENALTY PURSUANT TO SECTION 14(e) OF THE ACT

Claimant seeks imposition of a 10 percent penalty, pursuant to Section 14(e) of the Act, on the difference between the amount paid, as adjusted pursuant to Section 10(f) of the Act, of $133.00 and the amount due, as adjusted, of $178.00, from October 17, 1973, until paid. Section 14(e) provides, in part, as follows:

> (e) If any installment of compensation is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment * * *

Section 14(b), referred to in Section 14(e) provides, in part, as follows:

> (b) * * * [first installment] *Thereafter compensation shall be paid in installments, semi-monthly,* except where the deputy commissioner determines that payment * * * should be made monthly or at some other period. (Emphasis supplied).

Carrier initially denied that Widow was the surviving wife (Cl. Exh. 1, p. 32) but, following the Assistant Deputy Commissioner's letter of September 12, 1973 (Cl. Exh. 1, p. 40) retracted its denial of eligibility and filed Form BEC–206, "Payment of Compensation Without Award" on or about October 1, 1973 (Cl. Exh. 1, p. 4). Carrier showed a single computation in item 8—average weekly wage $798.00×½=$167.00, which demonstrated no doubt or reservation on Carrier's part that Widow, in her own right, was entitled to not less than $167.00, and, accordingly, made no computation for Son. The Deputy Commissioner by letter dated October 4, 1973, notified the parties that he intended to make an award on October 17, 1973, which would call for compensation payments at a maximum weekly rate of $167 (Cl. Exh. 1, p. 42) and his Compensation Order of October 18, 1973, was quite specific that Carrier pay benefits to Widow *in her own behalf at the rate of 50% of the average weekly wages of Employee* and in behalf of Son at the rate of 16⅔% of the weekly wages, *"subject to a basic maximum amount payable in behalf of all beneficiaries of $167* per week" (Cl. Exh. 1). Carrier on October 20, 1973, unilaterally reduced total benefit payments from $167 previously paid Widow and Son to $133 paid Widow alone (Cl. Exh. 10, attached Carrier Voucher No. D42707). Objection was made by counsel for Widow, by letter dated November 23, 1973 (Cl. Exh. 10), to the reduction in

the amount of benefit payment *and* he questioned payment on a monthly basis. The Deputy Commissioner, by letter dated December 5, 1973, directed Carrier to pay Widow $167 (plus adjustment under Section 10(f)) (Cl. Exh. 1) biweekly (Cl. Exh. 12).

The letter of the Assistant Deputy Commissioner, dated December 11, 1973 (ALJ Exh. 1) set forth the position of the parties: first, that of Claimant; second, that of the Director; and, third, that of Carrier. The Assistant Deputy Commissioner did not, as asserted by Carrier at the hearing (Tr. 41–42), offer three options to Carrier. To the contrary, he merely stated, in referring the matter to this Office for hearing, the positions of the parties.

Sections 14 (b) and (e) of the Act require that compensation be paid in semimonthly installments unless the Deputy Commissioner determines otherwise. Here the Deputy Commissioner directed semimonthly payment and Carrier failed and refused to comply with the statutory requirement and/or the direction of the Deputy Commissioner of December 5, 1973, until at least sometime after April 2, 1974. Although it is assumed that semimonthly payments were begun following the hearing, as counsel for Carrier assured would be done, there is no indication in Carrier's letter of April 18, 1974 (ALJ Exh. 3–A and 3–B) that semimonthly payments have, in fact, been made.

Carrier's computation, in conjunction with its payment of compensation without award, shows that Widow was entitled, in her own behalf, to benefits of $167.00 weekly. The Compensation Order of October 18, 1973, in clear and unambiguous language, required the payment to Widow, in her own behalf, of one half the agreed average weekly wage of $798.00, subject

to a basic maximum amount in behalf of all beneficiaries of $167.00 per week. Because the Compensation Order and Award was set aside by the decision of the Benefits Review Board on December 6, 1973 (BRB No. 132–73, Cl. Exh. 9), payment of compensation must be considered as compensation payable without an award; nevertheless, the computation of benefits, as shown therein, constituted notice to Carrier of the Deputy Commissioner's position concerning the payment due Widow in her own behalf. Carrier's unilateral action in reducing the total benefit paid Widow on and after October 17, 1973, was contrary to the provisions of Section 9(b), was neither authorized nor required by Section 6(b)(1), was contrary to the instructions of the Deputy Commissioner, and was an erroneous and incorrect determination of the compensation payable to Widow without an award. Carrier had filed no cross appeal from that portion of the Compensation Order and Award of October 18, 1973, which fixed the benefit payable to Widow; and Carrier had filed no notice of controversion pursuant to Section 14(d) of the right of Widow to benefits in excess of $125.25. Moreover, as noted above, Carrier disregarded the provisions of the statute with regard to frequency of payment and, after the Deputy Commissioner on December 5, 1973, directed semimonthly payment, Carrier failed and refused to make semimonthly payments to Widow at least through April 2, 1974.

Accordingly, as Carrier failed to pay the benefits due within fourteen days after each installment became due from and after October 17, 1973, until April 15, 1974, Carrier will be ordered to pay, in addition to each installment, an amount equal to 10 per centum of the difference between the amount paid ($133) and the amount due ($178) on each weekly installment after October 17, 1973, to April 15, 1974.

II. DEATH BENEFIT COMPENSATION

A. POSITION OF THE PARTIES

Claimants contend that, pursuant to Section 9(b) of the Act, Widow is entitled to a death benefit [4] of 50 per centum of the average wages of the deceased ($798.00) or $399.00 per week and Son is entitled to an additional amount of 16⅔ per centum of the average wages of the deceased ($798.00) or $133.00 per week until his 23rd birthday, October 17, 1978, so long as he shall remain a full-time student as defined in Section 2(18) of the Act. In addition, the benefits computed pursuant to Section 9(b) of the Act would be subject to further adjustment in accordance with Section 10(f) of the Act effective October 1 of each year beginning October 1, 1973. Claimants seek the death benefits described from the date of Employee's death, May 11, 1973; but Employer and Carrier have paid, as of April 15, 1974 (ALJ Exh. 3–A and 3–B), a total benefit on behalf of both beneficiaries (Widow and Son) of $167.00 per week plus the adjustment required on such amount pursuant to Section 10(f) of the Act from October 1, 1973.

The Director agrees with Claimants as to the computation of death benefits under Section 9(b) of the Act and concedes that Section 9(e) does not, because, he contends, of obvious "oversight" by Congress, specifically incorporate the maximum limitation of Section 6(b)(1) of the Act as to death benefits, but asserts that the maximum limitation of Section 6(b)

[4] Reasonable funeral expenses not exceeding $1,000 are provided by Section 9(a) of the Act. Funeral benefits in the sum of $1,000.00 have been paid (ALJ Exh. 3–B) and, therefore, this benefit will not be further considered.

(1) is specifically linked to, and made applicable to, Section 9 death benefits by Section 6(d) of the Act which provides as follows:

> (d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Accordingly, the Director's position is that a widow, for example, is entitled, in her own behalf, to a death benefit of 50 percent of the average weekly wages of the decedent and a child to 16⅔ percent of the average weekly wages of the decedent, all death benefits being subject, however, to the maximum statutory limitation as set forth in Section 6(b)(1); and the widow's benefit, computed under Section 9(b), when in excess of the statutory maximum of Section 6(b)(1) is not subject to reduction when the child ceases to be entitled to benefits.

Employer adopts the position of the Director with respect to the maximum limitation on death benefits but further contends, contrary to the position of the Director, that Widow, upon Son's 18th birthday, was entitled to only $125.25, plus the adjustment required by Section 10(f). The latter contention of Employer has already been rejected as erroneous and contrary to the provisions of the Act.

B. SECTION 9(e)

Prior to the amendments of 1972, Section 9(e) had read as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been *not more* than $105 nor *less* than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased. (Emphasis supplied).

Both a maximum, $105.00, and a minimum, $27.00, of "average weekly wage" was provided.

Section 9(e), as amended, now provides that the average weekly wages of the deceased shall be considered to have been *not less than the applicable national average weekly wage* as prescribed in section 6(b). There is no maximum limitation on the average weekly wages of deceased.

C. LEGISLATIVE HISTORY

1. *The Amendment of Section 9(e) of the Act*

Senate Report 92–1125, 92nd Congress 2nd Session (1972), in compliance with subsection 4 of Rule XXIX of the Standing Rules of the Senate, showed the changes in existing law made by the bill as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic (underscored herein), existing law in which no change is proposed is shown in roman):

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor] less than [$27] *the applicable national average weekly wage as prescribed in section 6(b)* but the total weekly [compensation] *benefits* shall not exceed the *average* weekly wages of the deceased. (S. Rep. 92–1125 at p. 40; *Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972* (hereinafter referred to as "Legislative History"), p. 102).

House of Representatives Report No. 92–1441, in compliance with rule XIII of the Rules of the House of Representatives, showed the change in Section 9(e) as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased] *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.* (H.R. Rep. 92–1441 at p. 37; Legislative History at p. 243).

2. *Hearings*

S. 2318 was introduced in the Senate July 20, 1971 (Legislative day, July 19) and, *inter alia,* proposed elimination of the maximum limitation on average weekly wages on compensation for disability (Sec. 4(a) of the bill, Legislative History, p. 6) and the elimination of the maximum limitation on average weekly wages on death benefits (Sec. 10(b) of the bill, Legislative History, p. 10). In each instance, the amount payable would be a percentage of average weekly wages with stated minimums. Sec. 10(b) of the bill provided as follows:

> (b) Section 9(e) of such Act is amended to read as follows:
> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than $80 but the total weekly compensation shall not exceed the weekly wages of the deceased.

The provisions of H.R. 12006, introduced in the House December 2, 1971, were the same (See, Sec. 4(a), Legislative History, p. 146, and Sec. 10(b), Legislative History, p. 149–150).

By contrast, S. 525, introduced by the late Senator Prouty, proposed an increase in benefits but retained a maximum limitation both in Section 6 and in Section 9(e) of the Act.[5]

Hearings on bills S. 2318, S. 525 and S. 1547 to amend the Longshore Act convened May 2, 1972, before the Subcommittee on Labor of the Committee on Labor and Public Welfare, Senator Eagleton presiding.[6] Senator Eagleton summarized the intent of the three bills before the Subcommittee as follows:

> * * * S. 2318, which I cosponsored with Senator Williams, would eliminate the maximum payment limitations. It would also provide for the Secretary of Labor to make an annual calculation of the increase in wages so as to upgrade the benefits for those already on disability from year to year.
>
> The second bill, S. 525, introduced by the late Senator Prouty at the request of the administration, would also increase the benefits although retaining a maximum limitation. This bill would also extend the coverage of the Longshore Act to include shipowners as employers.

[5] S. 525 proposed to amend section 9(e) of the Act as follows: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $178.50, nor less than $52.50 * * *" (Hearing p. 19).

[6] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearing before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess., on S. 2318, S. 525 and S. 1547, herein the volume is referred to as "Hearings" followed by the appropriate page.

> S. 1547, introduced by Senator Tower, would extend the coverage of the Longshore Act to workers employed in off-shore oilwell operations. (Hearings, p. 2).

There was extensive testimony in support of the proposed elimination of maximum limitation provisions by S. 2318 and there was testimony in support of retention of maximum limitation as proposed by S. 525. Howard McGurgan, Legislative Representative, AFL–CIO, with respect to "Maximum and Minimum Limits of Disability Compensation and Allowance", stated, in part, as follows:

> Mr. Chairman, the AFL–CIO is opposed to the weekly benefit amount proposals in S. 525 because they fail to meet the fundamental goal of workmen's compensation. * * *
>
> * * * * * *
>
> Section 8 (a), (b), and (c) of the Longshoremen's Act specifies that the weekly wages replacement shall be 66 2/3 percent of the injured worker's average weekly wage, and the AFL–CIO would like to see this goal achieved. (Hearing, p. 63).

With respect to "Death Benefits", Mr. McGurgan stated, in part, as follows:

> In addition, the weekly wage used to compute death benefits in other cases would be the weekly wage of the unfortunate victims. The AFL–CIO supports this approach to the computation of death benefits. We sincerely hope the committee will adopt the proposal contained in S. 2318. (Hearings, p. 65).

Patrick Tobin, Washington Representative, International Longshoremen's & Warehousemen's Union, stated, in part, as follows:

> We join with the International Longshoremen's Association, AFL–CIO, the District of

Columbia AFL–CIO representatives, and other Unions in supporting S. 2318 and opposing S. 525. (Hearing, p. 133).

Thomas W. Gleason, President of International Longshoremen's Association, AFL–CIO, in a prepared statement, stated, in part, as follows:

> We strongly support the enactment of S. 2318 as the most effective proposal to accomplish the long overdue increase in the benefit levels of injured longshoremen. First and foremost, that bill would eliminate the artificial and totally unrealistic restrictions on benefit amounts. This would enable compensation awards, for the first time, to reflect realistically the loss of earnings suffered by injured employees. * * * (Hearings, p. 157).

Frank Bonadio, President of Building and Construction Trades Department, AFL–CIO, in a prepared statement, stated, in part, as follows:

> * * * The Williams' bill (S. 2318) would correct the inequities that exist under these two Federal laws and is consistent with the intent and purpose of workmens' compensation laws when they were initially enacted in the first two decades of this century. We urgently request the (sic) the Committee give favorable consideration to this proposal.
>
> On behalf of the Building and Construction Trades Department, AFL–CIO we fervently trust that the Committee will give full consideration to these recommendations and at the earliest opportunity will report to the Senate a bill which will provide full protection to the workers and their families covered by the Act against the crippling effects of on-the-job injuries. (Hearings, pp. 688–689).

Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, in a letter to Senator Williams, stated in part, as follows:

> I would appreciate the inclusion in your records of this letter of support by the Teamsters Union for S. 2318. * * * Similarly, we state our opposition to parallel measures S. 525 and S. 1547 * * * (Hearings, p. 700).

Ralph Hartman, then Assistant Manager, Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corporation, together with Edward Hood, President and Board Chairman of the Shipbuilders Council of America, testified on behalf of Shipbuilders Council of America. Mr. Hartman stated, in part, as follows:

> * * * The industry has an obligation to its employees, and we are aware of the fact that they are exposed to hazards and hazardous employment, and we are interested that they receive an equitable and fair loss of earnings replacement. The wage loss replacement concept is the basic underlying objective of workmen's compensation.
>
> It is on this premise that we endorse the basic concepts of S. 2318, and propose innovations or variations which we consider urgent and demanding, yet equitable to all concerned. (Hearings, pp. 170–171).

* * * * *

> Of major impact and importance to the industry are the proposals to increase weekly benefits. One such proposal would amend section 6(b) of the Act by increasing the minimum weekly rate from $18 to $54 and eliminating the present maximum weekly benefit rate of $70.
>
> We agree that the minimum rate should be increased. However, this proposal leaves us

with a weekly benefit rate of two-thirds of the employee's average weekly earnings without limitation.

Currently the reported weekly average wage in the shipbuilding and ship repair industry approximates $165.

I have just learned this morning that the Quarterly Report issued by the Bureau of Labor Statistics shows that figure now to be for the first quarter, $173.

That covers straight time, overtime, shift work differentials, vacation, and holiday allowances. Applying the two-thirds factor to $165 could result in an average weekly compensation rate of $110. This we do not question, but we do recognize our obligation to all employees, some of whom would not be adequately compensated if limited to two-thirds of the weekly wage in the industry.

I make this point parenthetically because a number of States have recently removed a fixed-dollar maximum and set the maximum rate at two-thirds of the State average weekly wage; two-thirds of the man's average wage, subject to a maximum of two-thirds of the State average weekly wage.

We recognize the intent of the proposal, and we suggest for your consideration that the maximum weekly benefit be predicated upon the average weekly wage in the shipbuilding and ship repair industry, that it be 66 and two-thirds percent of the injured employee's average weekly wages computed under section 10, subject to a maximum of 150 percent of the average weekly wage of the shipbuilding and ship repair industry.

Assuming the average weekly wage as stated, that is, $165, and applying the 150 percent factor, projects a maximum weekly rate of $247.50 in the industry. The average weekly wage in the industry could readily be obtained

from the quarterly reports published by the Bureau of Labor Statistics. (Hearings, pp. 171–172).

* * * * *

Mr. Hood, I would like to say that Mr. Hartman's statements reflect a consensus of the membership of the Shipbuilder's Council. (Hearings, p. 177).

In his prepared statement, Mr. Hartman referred specifically to the proposed amendment of Section 9(e) of the Act and stated as follows:

> Section 10(b) of the bill would amend Section 9(e) of the Act by increasing from $27 to $80 the minimum average weekly wage base to be used in computing death benefits and would eliminate the current maximum average weekly wage base of $105. Here again, the industry suggests that the maximum be the average weekly wage in the shipbuilding and ship repair industry, as proposed in Section 6(b). (Hearings, pp. 203–204).

Edward D. Vickery, senior partner in the law firm of Royston, Rayzor, Cook & Vickery of Houston and Galveston, Texas, submitted a statement on behalf of the National Maritime Compensation Committee in which he stated, in part, as follows:

> Section 4 of S. 525
> and
> Section 4 of S. 2318
>
> Increases in Maximum and Minimum Limits of Compensation
>
> S. 525 would amend Section 6(b) to increase the maximum weekly compensation rate of $70 per week to $119 and the minimum rate from

$18 to $35; and would amend Section 14(m) to increase the statutory maximum portionately (sic) from $24,000 to $40,800 for all cases other than total permanent disability or death. S. 2318 would amend Section 6(b) by removing all maximum limits on the weekly compensation rate and would increase the minimum to $54 per week; and would repeal Section 14(m) in order to remove all monetary limits on compensation payments in all cases.

COMMENT: If the circular liability claims are eliminated, the National Maritime Compensation Committee recognizes that an increase in the maximum weekly compensation benefits is indicated, with a corresponding increase in the statutory maximum. The basic question presented by the provisions of the two bills is whether a maximum limit should be maintained on weekly compensation benefits and on all cases other than total permanent disability and death. The National Maritime Compensation Committee respectfully submits that it is of primary importance that the monetary maximum both on weekly benefit and in all cases other than those involving total permanent disability and death be maintained. * * * (Hearings, p. 318)

* * * * *

Section 8 of S. 525
and
Section 10 of S. 2318

INCREASE IN DEATH BENEFITS

S. 525 would increase death benefits payable to a widow from 35% to 45% and increasing compensation for the first child from 35% to 45% if there is no surviving wife. S. 525 retains the weekly maximum monetary limitations on

death benefits whereas S. 2318 removes all limitations on the weekly maximum monetary benefits and increases the allowance for funeral expenses from $400 to $800.

COMMENT: For the reasons previously discussed in some detail in connection with Section 4 of both S. 525 and S. 2318, we respectfully submit that it is not advisable to remove the monetary maximum benefits payable per week under the Longshoremen's Act and therefore recommend that the provisions of Section 8 of S. 525 be retained in this regard. * * * (Hearings, p. 334).

3. S. 2318 As Amended

The hearings before the Senate Subcommittee concluded on June 5, 1972. On September 13, 1972, Senator Eagleton reported a completely revised version of S. 2318 (Legislative History, pp. 15–61, original version pp. 3–12) which was accompanied by S. Rep. 92–1125 (Legislative History, p. 63). Sec. 5 of amended S. 2318 set forth the proposed amendments of Section 6(b) of the Act, as enacted, including subsection (d); and Sec. 10 of amended S. 2318 set forth the proposed amendments of Section 9 of the Act, Death Benefits, as enacted. Subsection 10(d) of amended S. 2318 set forth the proposed amendment of Section 9(e) of the Act, as enacted. As already noted in Section 1 of this Part C, S. Rep. 92–1125, beginning at page 26, Legislative History, page 88, showed the changes in existing law, and at page 40 of the Report, page 102 of the Legislative History, the changes in Section 9(e) of the Act made by amended S. 2318. Deletion of the maximum limitation on average weekly wages thus appears to have been a purposeful change.

S. Rep. 92–1125 discussed the Major Provisions of the Bill and begins with "Improvement of the Bene-

fit Structure" at page 5 (Legislative History, p. 67). The first item discussed thereunder was *Maximum and minimum benefit amounts,* and the Report stated, in part, as follows:

> The basic requirement of the Act is for the injured worker to receive 66⅔% of his average weekly wage. Historically this ⅔ requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. * * *
>
> Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor * * *
>
> To the extent that * * * survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased as the ceiling moves to 200 percent. * * * (S. Rep. 92–1125, p. 5; Legislative History, p. 67).

The next item discussed under "Improvement of the Benefit Structure", was, *Survivor Benefits,* and the Report stated, in part, as follows:

> The benefit structure for survivors is altered to provide additional benefits for widows and children * * * Section 9 of the Act (Section 10 of the bill) is amended to increase funeral benefits from the present 400 dollars to a more realistic amount of 1,000 dollars. The present Act provides that a surviving wife or husband receives 35 percent of the award, and children receive 15 percent. The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children,

> *subject to a maximum of 66⅔ percent of the average weekly wages.*
>
> * * * * *
>
> A minimum death benefit tied to the applicable national weekly wage but not to exceed the employee's average weekly wage is also provided. (S. Rep. 92–1125, p. 6; Legislative History, p. 68) (Emphasis supplied).

S. Rep. 92–1125, beginning at page 16 of the Report (page 78 of the Legislative History), also set forth a Section by Section Analysis of S. 2318 and provided, in part, as follows:

> *Section 10(d)* amends section 9(e) to provide that in computing death benefits the employee's average weekly wage shall be considered as not less than the national average weekly wage. *However, maximum weekly death benefits could not be more than the employee's average weekly wages.* (S. Rep. 92–1125, p. 22; Legislative History, p. 84) (Emphasis supplied).

S. 2318 was passed by the Senate September 14, 1972 (Legislative History, p. 139).

H.R. 12006 was introduced by Congressman Daniels on December 2, 1971 (Legislative History, p. 143) and on September 25, 1972, was reported with an amendment, committed to the Committee of the Whole House on the State of the Union (Legislative History, p. 159). H.R. 12006, as amended, was identical to S. 2318, and was accompanied by H.R. Report No. 92–1441, 92nd Cong., 2nd Sess. (1972). As noted in Section 1 of Part C, H.R. Rep. 92–1441, beginning at page 24, Legislative History at page 230, showed the changes in existing law, and at page 37, page 243 of the Legislative History, the changes in Section 9(e) of the Act. The changes in Section 9(e) of the Act are shown in a different manner than in S. Rep. 92–

1125 which is a further indication that deletion of the maximum limitation on average weekly wages was a purposeful change.

H.R. Report 92–1441 provided a Summary of Major Provisions of the Bill, beginning at page 2 of the Report, page 208 of the Legislative History, and the text of the Summary with respect to "Survivors Benefits" is identical to the language of S. Rep. 92–1125 under the same heading (See, H.R. Rep. 92–1441, p. 4, Legislative History, p. 210). H.R. Rep. 92–1441 also contained a Section-By-Section Description of Committee Amendment to the Bill, beginning at page 14 of the Report, page 220 of Legislative History, and with respect to Section 10 of the bill stated, in part, as follows:

Section 10

This section amends section 9 (pertaining to compensation for death) of the Act.

* * * * *

Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under the present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the act, except that *the total weekly benefits may not exceed the actual average weekly wages of the deceased.* (H.R. Rep. 92–1441, p. 19: Legislative History, p. 225). (Emphasis supplied).

Congressman Daniels spoke in support of the bill on October 14, 1972, and stated, in part, as follows:

Mr. Speaker, I would like to go into the major provisions of the bill.

A basic requirement of the act is for the injured worker to receive 66⅔ percent of his average weekly wage. As the result of the 12 year freeze, very few workers now actually receive this figure. The bill seeks to correct this deficiency. It provides *that the maximum compensation for disability shall not exceed a percentage of the national weekly wage* to be determined by the Secretary of Labor.

* * * * *

It provides increased benefits to widows and dependent children.

* * * * *

It provides increased benefits to survivors of workmen killed as a result of job injuries.

* * * (Legislative History, p. 286) (Emphasis supplied).

Congressman Steiger, on October 14, 1972, stated, in part, as follows:

Mr. Speaker, I rise in support of this much-needed improvement in the Longshore Compensation Act.

Because the time is so short my extension will include a series of questions and answers which discuss the most substantive issues included in this bill.

* * * * *

The questions and answers follow: (Legislative History, pp. 297–298)

* * * * *

Question. Do the amendments change the death benefits?

Answer. Under present law, the maximum allowed for funeral expenses is $400. The bill raises this maximum to $1000. Also, a surviving wife or dependent husband is now entitled to

compensatory payments equaling 35 percent of the deceased's average wage, and 15 percent of the deceased's average wage for each dependent child. The percentage for the surviving spouse is raised by the bill to 50 percent and the percentage for each dependent child is raised to 16⅔ percent. The Act's present total compensation maximum of 66⅔ percent of the deceased's average wage is retained * * * (Legislative History, p. 301).

H. R. 12006 was passed on October 14, 1972 (Legislative History, p. 307); S. 2318 was amended by striking out all after the enacting clause and provisions of H.R. 12006 inserted in lieu thereof and the amendment was agreed to by the House (Legislative History, p. 324); and on October 14, 1972, the presiding officer laid before the Senate the amendment of the House of Representatives to the bill (S. 2318). (Legislative History, p. 331). Before concluding action on S. 2318, Senator Williams made, in part, the following statement:

* * * This legislation represents the *first serious step toward reform of our society's workmen's compensation laws in the past 50 years.*

* * * * *

* * * Last year there were more than 109,000 injuries in this statute; 240 workers covered by the act were killed. * * * (Legislative History, p. 371).

* * * * *

The National Commission on Workmen's Compensation laws which we created in passing the Occupational Health and Safety Act of 1970 has submitted a comprehensive report and recommendation of the need to upgrade workmen's compensation standards nationwide including if necessary the imposition of Federal standards.

In the limited but significant area covered by

the Longshoremen Act we have attempted to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission.

I shall in the near future be giving careful consideration to a measure which will implement or improve upon the National Commission's recommendations and I certainly expect to use the improvements in this bill as a model. (Legislative History, p. 372).

* * * * *

The bill amends the act to provide that the maximum compensation for disability shall not exceed 200 percent of the national average weekly wage * * * (Legislative History, p. 374).

* * * * *

The benefit structure for survivors is altered to provide additional benefits for widows and children * * * The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages. * * * (Legislative History, p. 375).

Following Senator Williams' remarks and inclusion of telegrams of endorsement by unanimous consent (Legislative History, p. 380), Senator Javits moved that the Senate concur in the House amendment and the motion was agreed to. (Legislative History, p. 381).

4. Section 6(d) of the Act.

The Director asserts that the maximum limitation of Section 6(b)(1) is specifically linked to, and made applicable to, Section 9 death benefits by Section 6(d) of the Act. The Director's contentions have been most carefully considered but must be rejected as contrary

to the statute, as enacted, and contrary to the intent and purpose of Section 6(d).

Section 9(e) of the Act provides:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been *not less than the applicable national average weekly wage as prescribed in section 6(b)* but the total weekly benefits shall not exceed the average weekly wages of the deceased. (Emphasis supplied)

Section 6(d) of the Act provides:

> (d) Determinations under this subsection *with respect to a period shall apply to* employees or survivors currently receiving compensation for permanent total disability or death, as well as *those newly awarded compensation during such period.* (Emphasis supplied).

At the outset, the phrase *"Determinations under this subsection",* which, literally, refers to determinations under subsection (d), of which there are none, while now somewhat misplaced, was taken from Sec. 5(a) of the bill (S. 2318), *i.e.* Sec. 5(a) of the bill amended Section 6 of the Act by striking out subsections (b), (c) and (d). The reference to "Determinations under this subsection" obviously referred to determinations under subsection (a) of Sec. 5 of the bill (S. Rep. 92–1125, pp. 13–14, Legislative History, pp. 27–28). Accordingly, the reference to "Determinations under this subsection" is construed to mean determinations under Section 6 (b) and (c).

Of more significance is the limiting language which follows, namely, "Determinations * * * *with respect to a period*" shall apply, *inter alia,* to "those newly awarded compensation during such period". There is no dispute that survivors are included in the phrase,

"those newly awarded compensation" and for present purposes subsection 6(d) may be read as, "Determinations with respect to a period apply to surviors newly awarded compensation." Section 9(e) provides that the average weekly wages of the deceased shall be considered to have been "not less than the *applicable* national average weekly wage as prescribed in section 6(b)". Where the average weekly wage of the deceased is less than the national average weekly wage prescribed in Section 6(b), then the national average weekly wage is substituted for the "average weekly wage" under Section 9(e). Section 6(d) merely provides that determinations under Section (b) with respect to a period apply to survivors awarded compensation during such period. In other words, the national average weekly wage for the period in which eligibility begins is the "applicable national average weekly wage". See, for example, *Clarence Warren* v. *Jacksonville Shipyards, Inc., et al.,* 74–LHCA–3 (1974); *James Hutson* v. *Jacksonville Shipyards, Inc., et al.,* 74–LHCA–19 (1974).[7] Although, for ease

[7] The Claimants, Warren and Hutson, each became totally and permanently disabled as a result of silicosis prior to the effective date of the 1972 amendments. Claimant Warren died December 20, 1972, and Claimant Hutson died April 13, 1973, and in each instance death was caused by the disease of silicosis contracted in the course of employment. Each deceased earned less than the national average weekly wage and each survivor was awarded, pursuant to Section 9(e), death benefits as follows: Mrs. Warren, beginning December 20, 1972, and ending September 30, 1973, $65.90 per week (50% of National Average Weekly Wage of $131.80); beginning October 1, 1973, and ending September 30, 1974, $70.00 per week (50% of NAWW of $140.00); thereafter, effective October 1 of each year, the death benefit shall be adjusted in accordance with Section 10(f) of the Act. Mrs. Hutson, beginning April 14, 1973, and ending September 30, 1973, $65.90; beginning October 1, 1973, same weekly benefit as described for Mrs. Warren.

of determination, the National Average Weekly Wage for 1972 and 1973 was used in these decisions, the result, vis-a-vis the benefit payable, would be the same if the weekly death benefit for the initial period of eligibility (1972) were adjusted pursuant to Section 10(f).

Not only is this construction consistent with the language of Sections 9(e) and 6(d) of the Act, but S. Rep. 92–1125 plainly stated that this was the purpose and effect of Section 6(d). Thus, the Section-By-Section Analysis of S. 2318, stated:

> *Subsection (d) states that determinations of national average weekly wage made with respect to a period apply to* employees or survivors currently receiving compensation for permanent total disability or death benefits, as well as *those who begin receiving compensation for the first time during the period.* (S. Rep. 92–1125, p. 18, Legislative History, p. 80) (Emphasis supplied).

H.R. Rep. 92–1441 in the Section-By-Section Description of Committee Amendments to the Bill (H.R. 12006) does not discuss this paragraph (H.R. Rep. 92–1441, p. 15, Legislative History, p. 221). Silence, alone, in this instance would negate any purpose to impose a limitation on weekly death benefit payments; but, as previously noted, H.R. Rep. 92–1441, in the Summary of Major Provisions of the Bill directly and categorically is to the contrary. Thus, in describing Survivor Benefits the Report stated:

> The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages. (H.R. Rep. 92–1441, p. 4, Legislative History, p. 210).

5. Report of the National Commission on Workmen's Compensation Laws

The Director also asserts that, as Senate Report 92–1125 states with respect to maximum and minimum benefit amounts set forth in Section 6(b)(1): "These maximums meet the recommended standards of the National Commission on State Workmen's Compensation Laws" (S. Rep. 92–1125, p. 5, Legislative History, p. 67), Congress must have intended to apply the 6(b)(1) maximum to death benefits. This argument is a non sequitur. First, this statement appears under the section entitled "Maximum and minimum benefit amounts", and clearly relates to the provisions for disability compensation (Section 6(b)(1) of the Act). Second, the reference is not repeated in the following section entitled "Survivor Benefits" where it is stated,

> The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages.
>
> * * * * *
>
> A minimum death benefit tied to the applicable national average weekly wage but not to exceed the employee's average weekly wage is also provided. (S. Rep. 92–1125, p. 6, Legislative History, p. 68).

Accordingly, regardless of what may have been recommended by the National Commission on Workmen's Compensation Laws, Senate bill 2318, and the accompanying Report, provided, as to death benefits, 50% of average weekly wages of the deceased for the surviving wife or husband and 16⅔% of the children, subject only to a maximum of 66⅔ percent of the average weekly wages.

Third, the recommendations of the Commission were, in any event, minimum recommendations and, as Senator Williams stated, his intent, and I believe the prevailing intent in both the House and the Senate, was to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission." (Legislative History, p. 372).

Fourth, the Report of the National Commission fully supports the grant of a percentage of average weekly wages of the deceased without imposition of an arbitary limitation. Thus, the Report of the National Commission on Workmen's Compensation Laws, in Section E, "Death Benefits", stated in part, as follows:

> Work-related deaths account for less than one percent of all workmen's compensation claims and less than 10 percent of all benefits. *As the ultimate tragedy, work-related death deserves full compensation.* The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program. (Emphasis supplied).

The Proportion of Lost Remuneration To Be Replaced

* * * Section 18 of the Model Act provides that a surviving spouse will receive 50 percent of the weekly wages of the deceased * * *

Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the

> proportion of wages to be replaced should be less in death cases than in total disability cases. *However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivational problems, which suggests that replacement of more than* the normal 66⅔ *percent of lost wages is appropriate.* * * * (Report at p. 71).

With such compelling considerations in mind, Congress, in enacting a model compensation act, would have found it difficult, consistent with its objective of wage loss replacement, to justify imposition of any arbitrary limitation on the 50% proportion of wage loss replacement for a widow, and it did not do so. Moreover, the record showed that in 1970 the weekly wage for longshoremen in New York and vicinity ranged from $184.00 for general cargo to $328.80 for explosives and damaged cargo (Hearing, p. 99); modal range for San Francisco-Oakland, June–August, 1969 from $150.00 to $249.00 per week (Hearing, p. 100); and $173.00 for the shipbuilding and ship repair industry for the first quarter of 1972 (Hearing, p. 171). Fifty percent of the highest figure ($328.80) would, pursuant to Section 9(b) of the Act, have resulted in a weekly benefit for a widow of $164.40 which might well have influenced the decision that a maximum limitation on death benefits was not required.

Conclusions as to Death Benefit Compensation

Section 9 of the Act provides as compensation for death, a percentage of the average wages of the deceased. Section 9(b) of the Act provides that if there is a widow or widower the benefit is 50 percent of the

average weekly wages of the deceased and if there is a surviving child, the additional amount of 16⅔ percent of such wages; but the total amount payable shall not exceed 66⅔ percent of such wages. Prior to the 1972 amendments to the Act, Section 9(e) of the Act had provided that in computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105. The 1972 amendments to the Act removed the arbitrary limitation and, as amended, Section 9(e) of the Act now provides:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Section 6(b) contains limitations on maximum compensation for disability ranging from 125 per centum of the national average weekly wage, or $167, per week during the period ending September 30, 1973, to 200 per centum of the national average weekly wage beginning October 1, 1975; but the limitations set forth in Section 6(b)(1) are not applicable to death benefits under Section 9 of the Act and the limitations of Section 6(b)(1) are neither incorporated nor made applicable to death benefits by Section 6(d) of the Act.

As Mr. Justice Frankfurter stated, in *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States,* 340 U.S. 593, 596 (1951), statutory construction,

> * * * is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.

Congress, in amending Section 9(e) of the Act, intentionally, and with full awareness of the limitation provided in Section 6(b)(1) of the Act as to disability compensation, removed the arbitrary limitation previously applied to compensation for death and, instead, provided that death benefits should be a percentage of the average weekly wages of the deceased provided only that the total weekly benefit shall not exceed 66⅔ percent of the average weekly wages of the deceased and/or if the average weekly wage of the deceased were less than the applicable national average weekly wage, then total weekly benefits (which would in such circumstance be a percentage of the national average weekly wage) shall not exceed the average weekly wages of the deceased.

The purpose of Congress in amending Section 9(e), *inter alia,* to remove the limitation previously existing on death benefits was clearly expressed in the language of the amendment and is fully supported by the legislative history. The contention of the Director, that it is totally foreign to workmen's compensation to make death benefits superior to benefits for disability, is a policy consideration which must be addressed to Congress. *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212, 224 (1970), *reh' denied,* 397 U.S. 929 (1970). Suffice it to say that Congress has demonstrated, both by word and by action, that it is not wedded even to long followed concepts of workmen's compensation (See, for example, Federal Employees Compensation Act, 5 U.S.C. § 8101, *et seq.*) which Senator Javits described as archaic (Hearing, p. 36).

Rather, the intent of Congress in the 1972 amendments to the Act was "the first serious step toward reform of our society's workmen's compensation laws in the past 50 years" (Legislative History, p. 371) and to provide a "model of benefits and administration" (Legislative History, p. 372), and its removal of the limitation on maximum weekly earnings to be considered in computing death benefits was purposeful, with full awareness of the retained limitation on disability compensation, and in response to policy consideration which Congress obviously believed should control. I do not find the statute uncertain or ambiguous; but with full recognition that work-related death is the ultimate tragedy, to the extent that any "doubt" exists, "Doubts * * * are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton,* 220 F. 2d 820 (D.C. Cir. 1955); *Edith Alley* v. *Julius Garfinckel & Company, et al.,* BRB No. 74–111 at p. 6 (1974).

Accordingly, Widow was entitled to a death benefit of 50% of the Employee's average weekly wage of $798.00 from May 11, 1973, and Son was entitled to a death benefit of 16⅔% of the Employee's average weekly wage of $798.00 from May 11, 1973,[8] said death benefits being subject to further adjustment as of

[8] All computations are to be made by the Deputy Commissioner; however, for purposes of illustration, my computation shows Widow was entitled to $399.00 per week from May 11, 1973; Son to $133.00 from May 11, 1973, or a combined total of $532.00. Widow and Son, collectively, were paid benefits of $167.00 per week from May 11, 1973, collective sum of $365.00 per week is due from May 11, 1973, subject to adjustment as of October 1, 1973, and each October 1, thereafter in accordance with Section 10(f) of the Act. Benefits paid shall be fully credited against the amounts due and payable.

October 1, 1973, and October 1st of each year thereafter in accordance with the provisions of Section 10(f) of the Act. The foregoing benefits to continue as to Widow as provided in Section 9(b) of the Act; and as to Son as provided in Sections 9(b) and 2 (14) and (18) of the Act, i.e., until Son's 23rd birthday providing he continues to meet the definition of "student" as set forth in Section 2(18) of the Act and/or until Son ceases to be a "student" as set forth in Section 2(18) of the Act.

III. INTEREST

Interest at the legal rate of 6% per annum shall be paid on the difference between the amount of death benefits due from May 11, 1973, and the amount paid from May 11, 1973, said interest to run to the date of that order. In addition, Carrier shall, specifically, pay interest at the legal rate of 6 percent per annum on the difference between the death benefits due without an award ($178.00 as adjusted pursuant to Section 10(f)) and the amount paid ($133.00 as adjusted pursuant to Section 10(f)) from October 17, 1973, to April 15, 1974. *Humble Oil and Refining Company* v. *Taliaferro,* BRB No. 107–73 (1973).

IV. ATTORNEY'S FEE

Nicholas E. Karatinos, attorney for Claimants, seeks a fee for services pursuant to Section 28(b) of the Act. Mr. Karatinos has submitted his affidavit which shows in total 84 hours, including 6 hours at the hearing held on April 2, 1974. Mr. Karatinos evidenced extensive and thorough preparation for the hearing; his brief was of the highest professional quality; and, in all respects, I find the hours spent to

be reasonable, the total fee sought, $3,420.00, reasonable and fully warranted pursuant to the considerations set forth in Section 28(b) of the Act.

Edward J. Haniver, counsel for Employer-Carrier, submitted an affidavit in response to the affidavit of Mr. Karatinos. Mr. Haniver, if I correctly understand his affidavit, asserts that the original determination of death benefits was correct and, therefore, no attorney's fee may be awarded under Section 28(b) because, he asserts, there would be no difference between the award and the amount tendered or paid. Mr. Haniver did not challenge the reasonableness of the time involved or the amount of the fee and concedes that,

> If the claimant's attorney ultimately succeeds * * * a reasonable fee should be awarded to him which might properly be assessible in part against the employer and carrier. (Affidavit of Edward J. Haniver, dated 29 April 1974, p. 2).

The late Associate Solicitor, James G. Johnston, by letter dated May 7, 1974, addressed to Mr. Karatinos, with a copy to the undersigned and to Mr. Haniver, stated, in part, as follows:

> We have received a copy of your petition for attorney's fees in the above case and would refer you to the War Hazards Compensation Act, as amended, 42 U.S.C. 1701 *et seq.*, and the United States Code provisions relevant to activities of employees in claims against and other matters affecting the Government, 18 U.S.C. 203, 205.
>
> Section 104(a)(3) of the War Hazards Compensation Act provides that an employee or insurance carrier required to pay benefits pursuant to the Defense Base Act may be reimbursed for that amount, plus "reasonable and necessary claims expense in connection therewith" by the United States Government out of the Federal Employees' Compensation Act funds. If the insurance carrier requests such reimbursement for your fees, provided your clients prevail in the above litigation, you will be receiving fees for services rendered in other than an employee capacity from the Government.
>
> * * * * *
>
> While I do not intend to object to your request for attorney's fees at this time, I thought you should at least be aware of the various statutory provisions relevant to your claim.

The Assistant Solicitor quite correctly set forth the portion of Section 104(a)(3) of the War Hazards Compensation Act relating to reimbursement of "reasonable and necessary claims expense"; but whether an attorney's fee incurred in resisting a claim for which said person is determined to have been liable is a reasonable and necessary claims expense is at least questionable. Section 104(a)(3) provides, in part, that "such employer, carrier, or fund shall be entitled to be *reimbursed for all benefits so paid or payable*, including funeral and burial expenses, medical, hospital, or other similar costs for treatment and care; *and reasonable and necessary claims expense in connection therewith* * * *." This language, literally, provides for reimbursement for benefits paid or payable and reasonable and necessary claims expense—not attorney's fees incurred in avoidance of a valid claim. *Cf. Suderman Stevedores, Inc., et al.* v. *Seab Sanders,* BRB No. 122–73 (1973).

In addition, Section 104(b) of the War Hazards Compensation Act further provides:

> (b) No reimbursement shall be made under this Act in any case in which the Secretary finds that the benefits paid or payable were on account of injury, detention, or death which arose from a war-risk hazard for which a premium (which included an additional charge or loading for such hazard) was charged.

The record shows that a policy of insurance for workman's compensation was issued; that the address of the employer was 21 Huynh-Tinh-Cua St. Saigon; and correspondence states that the annual premium on Employee's policy was in excess of $1,800,000. Whether the premium charged included an additional charge or loading is a determination to be made by the Secretary; however, the location of the Employer together with apparent premium paid suggest that the premium paid may have included an additional charge or loading for the hazard insured.

The provisions of Title 18 United States Code §§ 203 and 205 do not apply, as the Assistant Secretary very correctly noted, when the officer or employee, with or without compensation is acting,

> as agent or attorney for his parents, spouse child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary * * *

Mr. Karatinos is employed by the National Labor Relations Board and had no personal participation as a Government employee in the matter involved. Only if the Secretary of Labor determines that reimbursement is not prohibited by Section 104(b) and that reimbursement is permitted by Section 104(a)(3) of the

War Hazards Compensation Act do the provisions of Title 18 come into play. Mr. Karatinos is acting as attorney for his sister-in-law; however, if the provisions of Title 18 apply, the services may, nevertheless, be exempt as services for a person for whom, or for any estate for which, Mr. Karatinos is serving as guardian, executor, administrator, trustee, or other personal fiduciary. There are neither sufficient facts in the present record to determine whether any such exemption might apply nor is this the appropriate forum to make such a determination.

I conclude merely that services have been performed for which a fee of $3,420.00 is reasonable and appropriate within the meaning of Section 28(b) of the Act; and that the award of a fee for legal services pursuant to Section 28(b) of the Act to an employee of the Government authorized by his agency to perform the services involved would not contravene public policy since no determination has been made that Employer-Carrier would be entitled to reimbursement for any attorney's fee paid hereunder and since, even if reimbursement were allowed, the services, and fee therefor, may be exempt in accordance with the provisions of 18 U.S.C. § 205. Moreover, the Benefits Review Board, in *Griffin Baker* v. *New Orleans Stevedoring Company, et al.,* BRB No. 74–124 (1974), has admonished that an award of attorney's fee is mandatory under Section 28(b) of the Act. Obviously, the Benefits Review Board did not intend by its statement in *Griffin Baker, supra,* to require the payment of an attorney's fee if such payment would violate the provisions of Title 18 even though it recognized that the mandatory language of Section 28(b) of the Act requires the award of an attorney's fee where a claim under the Act has been successfully prosecuted. A proper accommodation of the requirement of Section

28(b) of the Act and the equally salutary provisions of 18 U.S.C. § 203 and 205 can be achieved by an award of an attorney's fee subject, however, to the provision that payment of such fee shall be conditioned on: a) determination by the Secretary of Labor of any claim for reimbursement of the attorney's fee approved hereby; and b) if reimbursement of such attorney's fee is allowed by the Secretary of Labor, determination by appropriate authority whether the payment or receipt of such fee is permitted under 18 U.S.C. § 205.

GENEVIEVE O. RASMUSSEN
WIDOW OF WILLIAM C. RASMUSSEN,
DECEASED
WILLIAM C. RASMUSSEN, JR.
SURVIVING CHILD

ORDER

A. Geocontrol, Inc. and its insurance carrier, New Hampshire Insurance Company, shall forthwith pay to Mrs. Genevieve O. Rasmussen, surviving widow of Employee William C. Rasmussen, deceased, weekly death benefits subject, however, to the provisions of Section 9(b) of the Act, as amended, 33 U.S.C. § 909 (b), as amended, as follows:[9]

i) Beginning May 11, 1973, and thereafter during widowhood; 50% of the deceased Em-

[9] No provision is made in this Order for the payment of funeral expenses for the reason that the insurance Carrier has represented (ALJ Exh. 3–B) that funeral benefits in the full statutory amount of $1,000.00 have already been paid.

ployee's average weekly wage of $798.00 per week, or $399.00 per week.[10]

ii) Beginning October 1, 1973, and each October 1st thereafter, the weekly benefit determined in subparagraph i), above, shall be adjusted pursuant to Section 10(f) of the Act, as amended, 33 U.S.C. §910(f), as amended.

iii) In addition to the payment set forth in subparagraphs i) and ii), above, legal interest at the rate of 6% per annum on each weekly installment as it became due from May 11, 1973, to the date of payment pursuant to this Order, shall be paid.

B. Geocontrol, Inc. and its insurance carrier, New Hampshire Insurance Company, shall forthwith pay to William C. Rasmussen, Jr., surviving child of Employee William C. Rasmussen, deceased, weekly death benefits as follows:

i) Beginning May 11, 1973, and thereafter until October 17, 1978, his 23rd birthday, unless his status as a student, as defined in Section 2(18) of the Act, as amended, 33 U.S.C. § 902 (18), as amended, shall sooner terminate, 16⅔% of the deceased Employee's average weekly wages of $798.00 per week, or $133.00 per week.

ii) Beginning October 1, 1973, and each October 1st thereafter, the weekly benefit determined in subparagraph i), above, shall be ad-

[10] All computations provided for in this Order shall be made by the Deputy Commissioner and any computation shown herein shall be for purposes of illustration only and subject to verification and correction by the Deputy Commissioner.

justed pursuant to Section 10(f) of the Act, as amended, 33 U.S.C. § 910(f), as amended.

iii) In addition to the payments set forth in subparagraphs i) and ii), above, legal interest at the rate of 6% per annum on each weekly installment as it became due from May 11, 1973, to the date of payment pursuant to this Order, shall be paid.

C. Weekly death benefits previously paid Widow and/or Son by Employer-Carrier shall be credited against the sums due and payable as set forth in Paragraphs A and B, above.

D. The insurance carrier, New Hampshire Insurance Company, alone, shall pay forthwith the following sum as a penalty, pursuant to Section 14(e) of the Act, as amended, 33 U.S.C. § 914(e), as amended, for failure to pay from October 17, 1973, until April 15, 1974, the installment of compensation payable without an award:

i) 10 percent of the difference between the amount paid from and after October 17, 1973, to April 15, 1974 ($133.00 per week as adjusted pursuant to Section 10(f) of the Act, as amended) and the amount due without an award ($178.00 per week as adjusted pursuant to Section 10(f) of the Act).

E. In additional to the payment set forth in Paragraph D, above, the insurance carrier, New Hampshire Insurance Company, alone, shall pay forthwith legal interest at the rate of 6% per annum on the difference between the amount paid from and after October 17, 1973, to April 15, 1974, and the amount due without an award (but not including the amount of any penalty) on each weekly installment as it became due from October 17, 1973, to April 15, 1974,

the date of payment of the amount due without an award.

F. Geocontrol, Inc. and its insurance Carrier, New Hampshire Insurance Company, shall pay to: Nicholas E. Karatinos, Esquire, 16102 Pond Meadow Lane, Bowie, Maryland 20715, the sum of $3,420.00 as a reasonable attorney's fee, pursuant to Section 28(b) of the Act, as amended, 33 U.S.C. § 928(b), as amended. Payment of the foregoing fee for legal services shall be subject to the following express conditions:

i) Payment shall be deferred until the Secretary of Labor shall have determined, if Employer or Carrier applies for reimbursement pursuant to the provisions of the War Hazard Compensation Act, whether the attorney's fee approved herein is subject to reimbursement.

ii) If the Employer or Carrier does not apply for reimbursement of the attorney's fee approved herein, or if the Secretary of Labor shall deny reimbursement of the attorney's fee, then, in either event, the fee shall be paid forthwith.

iii) If the Secretary of Labor shall determine that the attorney's fee approved herein is subject to reimbursement pursuant to the War Hazards Compensation Act, then payment shall be further held in abeyance pending determination by appropriate authority that payment and receipt of the attorney's fee approved herein is permitted by the provisions of 18 U.S.C. § 205. If it should be determined that payment and receipt of said fee is permitted, then payment shall forthwith be made. If it should be determined by appropriate authority that payment of the fee approved herein would not be permitted under 18 U.S.C. 205, then

the obligation of Employer and Carrier to pay any fee for legal services to Nicholas E. Karatinos shall forthwith terminate.

iv) Nothing contained herein shall prevent the obtaining of a determination by appropriate authority under 18 U.S.C. § 205 at any time, whether or not any application for reimbursement has been made and/or determined, and if a determination by appropriate authority is obtained that payment and receipt of the fee approved herein would be permitted under 18 U.S.C. § 205, then the fee approved herein shall forthwith be paid.

WILLIAM B. DEVANEY,
Administrative Law Judge.

Dated: October 24, 1974, Washington, D.C.

U.S. GOVERNMENT PRINTING OFFICE: 1978

No Appendix has been reprinted since a motion to dispense with the printing of the record was made and granted.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1465

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
GEO CONTROL, INCORPORATED
and NEW HAMPSHIRE INSURANCE COMPANY

PETITIONERS

vs.

GENEVIEVE O. RASMUSSEN
and WILLIAM C. RASMUSSEN, JR.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM OF RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
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---

1. The Decision of the Ninth Circuit is Correct

Petitioners in this matter argue that the Ninth Circuit decision[1] is erroneous, and in some respects insufficient in its analysis of the issue. In fact, a reading of the decision reveals a detailed analysis of the statutory amendments and the legislative history preceding the amendments.

---

[1] *Dir. Office of Workers' Comp., Etc. v. Rasmussen*, 567 F.2d 1385 (1978).

The Ninth Circuit, at 1388 *supra* reviewed the extensive legislative history in this case, pointing out that the elimination of dollar maximums in death benefit cases was discussed time after time by senators, representatives and witnesses testifying on the proposed amendments. Further, the court noted that both the Senate and House of Representatives showed the excision of the dollar maximum from the death benefit section by bracketing the omitted language, and italicizing the new language.

The court rightly concludes at 1389:

> It is difficult to see how, in the light of this history and the manner in which the extent of the amendment was graphically illustrated, it can be maintained that Congress was unaware of the fact that while maximum limitations were imposed as to disability benefits they were eliminated as to death benefits.

Petitioners criticize this analysis nonetheless, apparently because the court did not focus its entire attention on Section 6(d) of the Act[2] and certain comments concerning it in the legislative history. The court did review Section 6(d) and petitioners' arguments thereon. The court, however, rejected petitioners' argument that Section 6(d) somehow incorporates into the death benefit section the disability benefits of Section 6(b)(1), because Section 9(e) is *not* ambiguous. Further, the entire legislative history must be examined, and the statute construed after weighing all relevant portions thereof.

Section 6(d)[3] is ambiguous. The specific portion of the legislative history purporting to explain section 6(d), heavily

[2] Longshoremens' and Harbor Workers' Compensation Act, Amendments of 1972, (hereinafter "the Act"), 33 U.S.C. see 606(d).

[3] Section 6(d) states:

Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for

relied upon by petitioners, is also ambiguous.[4] Reliance upon ambiguity to explain ambiguity is at best a murky exercise.

Petitioners' reading of Section 6(d) has two problematical results. First, it in essence rewrites Section 9(e). That section does not contain a dollar maximum. Petitioners would, in effect, have this Court insert therein the Section 6(b)(1) disability maximums. Such a function would be beyond statutory interpretation and would become statutory rewording - a legislative function. Such, of course, is not properly a judicial activity. *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 81 S.Ct. 557 (1960); *Elbert v. Poston*, 266 U.S. 548, 45 S.Ct. 188 (1924); *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173 (1948); *Northern P.R. Co. v. North Dakota*, 236 U.S. 585, 35 S.Ct. 429 (1974); *U.S. v. Calamaro*, 354 U.S. 351, 77 S.Ct. 1138 (1956).

Secondly, Petitioners' reading results in defining the "determinations" of Section 6(d) to be the Section 6(b)(1) percentages, that is, the determinations are of maximum benefits. This directly conflicts with the clear and unequivocal statement from the Senate Report that these "determinations" are of national average weekly wage, as described at Section 6(b)(3).[5]

permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

[4] That legislative history consists of but one sentence:

To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase in, their compensation is increased as the ceiling moves to 200%.

S. Rep. No. 92-1125, 92d Cong. 2d Sess. 5 (1972);
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972).

[5] S. Rep. 92-1125, at 18 states: "Subsection [6](d) states that determinations *of national average weekly wage* made with respect to a period. . . . ." (emphasis supplied).

A thorough and unbiased examination of the legislative history indicates but one conclusion: That Congress was mindful of its activity, and chose to eliminate dollar maximums in death benefit cases while maintaing them in the form of a sliding ceiling in disability cases.

2. Resolution of the Issue

All petitioners here argue that this matter can only be resolved by this Court. It is respectfully submitted that there is an alternative. If petitioners verily believe that Congress has chosen an unwise course in this legislation, then it is from Congress that Petitioners should seek redress. The legislative route is the proper one where, as here, petitioners seek to rewrite a statute.

3. Importance of the Case

The granting of a petition for a writ of certiorari is a matter of sound judicial discretion. [6] One criterion to be considered in the exercise of that discretion is the importance of the case. The Solicitor General, in his petition at 11, 12 indicates that only some five cases per year will arise where this decision would affect the amount of benefits. The slight impact of this figure is placed in perspective by the fact that there are some 770,000 persons covered by the Act.[7]

---

[6] Rule 19, Rules of the Supreme Court.

[7] *Petition for a Writ of Certiorari*, Geo Control, Inc. and New Hampshire Ins. Co., Petitioners, at 10.

4. Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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May 7, 1978

Supreme Court, U. S.
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Nos. 77-1465 and 77-1491

In the Supreme Court of the United States

OCTOBER TERM, 1978

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GENEVIEVE O. RASMUSSEN, ET AL.

GEO CONTROL, INCORPORATED and NEW HAMPSHIRE INSURANCE COMPANY, PETITIONERS

v.

GENEVIEVE O. RASMUSSEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GENEVIEVE O. RASMUSSEN, ET AL.

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v.

GENEVIEVE O. RASMUSSEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 567 F.2d 1385. The Benefits Review Board's opinion (Pet. App. 15a-25a) is reported at 1 BRBS 378. The decision of the administrative law judge (Pet. App. 27a-74a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1978. The petition on behalf of the Director of the Office of Workers' Compensation Programs, United States Department of Labor, was filed on April 14, 1978; the petition on behalf of Geo Control, Inc., and New Hampshire Insurance Company was filed on April 19, 1978. Both petitions were granted, and the cases were consolidated for review, on June 12, 1978. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the weekly rate of death benefits under the amended Longshoremen's and Harbor Workers' Compensation Act is subject to the maximum limitations of Section 6(b)(1) of the Act.

STATUTES INVOLVED

1. Before its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

[1] "Pet. App." refers to the appendix to the petition in No. 77-1465.

Section 6(b), 44 Stat. 1426, as amended, 33 U.S.C. (1970 ed.) 906(b):

> Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however*, That, if the employee's average weekly wages, as computed under section 10 of this title, are less than $18 per week he shall receive as compensation for total disability his average weekly wages.

Section 9, 44 Stat. 1429, as amended, 33 U.S.C. (1970 ed.) 909:

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> * * * * *
>
> (b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35

per centum of such wages increased by 15 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

* * * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in relevant part:

Section 6(b), (d), 33 U.S.C. (Supp. V) 906(b), (d):

(b)(1) * * * [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

* * * * *

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Section 9, 33 U.S.C. (Supp. V) 909:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the

amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each such child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

STATEMENT

Respondents are the widow and child of Dr. William C. Rasmussen, a hydrologist who was killed on

May 11, 1973, by a land mine explosion in the course of his work in Vietnam for Geo Control, Inc. His employment was within the coverage of the Defense Base Act, 55 Stat. 622, as amended, 42 U.S.C. 1651 *et seq.*, one of the several statutory extensions of the Longshoremen's and Harbor Workers' Compensation Act. When respondents claimed death benefits under the Longshoremen's Act, Geo Control and its workers' compensation insurer, New Hampshire Insurance Co., agreed that benefits were payable, but disputed the weekly rate claimed by the beneficiaries—two-thirds of Dr. Rasmussen's average weekly wages of $798, or $532 a week. The employer and insurer contended that the limitations of Section 6(b)(1) of the Longshoremen's Act, 33 U.S.C. (Supp. V) 906(b)(1)—initially $167 a week, and now $367.22 a week[2]—were applicable to death benefits in the same manner as to benefits for permanent total disability.

---

[2] The national average weekly wages, maximum benefit levels, and percentage increases determined by the Secretary under Sections 6(b)(3), 6(b)(1), and 10(f), respectively, since the 1972 amendments have been:

Effective Date	National Average Weekly Wage	Section 6(b)(1) Maximum	Section 10(f) Adjustment
11/26/72	$131.80	$167.00	——
10/1/73	140.36	210.54	6.49%
10/1/74	149.14	261.00	6.26%
10/1/75	159.19	318.38	6.74%
10/1/76	171.27	342.54	7.59%
10/1/77	183.61	367.22	7.21%
10/1/78*	198.25	396.50	7.97%

* Based on preliminary figures.

The question of the applicability of the Section 6(b)(1) limitations to death benefits was initially litigated before the Deputy Commissioner for the Fifteenth Compensation District of the Department of Labor's Office of Workers' Compensation Programs (OWCP). That was the first occasion to develop an administrative construction of the amended provisions; it had not previously been suggested that the death benefits payable to the survivors of high-income workers were unlimited in weekly rate under the amended Longshoremen's Act. The OWCP adopted the position, and the deputy commissioner ruled, that Section 6(d) made the weekly-rate limitations of Section 6(b)(1) applicable to death benefits in the same special way as to benefits for permanent total disability: the rate computed under the Act's general provisions (ordinarily based on two-thirds of the employee's weekly earnings) is to be limited only by the maximum rate in effect at the time the benefits are payable, rather than continuing to be subject to the limitation in effect at the time of the injury or death (Pet. 7-8; Pet. App. 27a-74a).

The beneficiaries appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the Longshoremen's Act (33 U.S.C. (Supp. V) 921(b)(3)), but the Board did not reach the substantive question; it vacated the deputy commissioner's decision on the ground that the regulations implementing the 1972 amendment to Section 19(d) of the Act (33 U.S.C. (Supp. V) 919(d)) had deprived the deputy commissioner of authority to resolve any contested issue,

even if no evidentiary hearing was necessary.[3] *Rasmussen* v. *Geo Control, Inc.*, BRB No. 132-73, decided December 6, 1973.

The dispute then came before an administrative law judge, who rejected the OWCP's construction and sustained the survivors' position that the weekly rate of death benefits under the Longshoremen's Act is subject to no maximum limitation (Pet. App. 27a-74a).

The Director of the OWCP and the employer and insurer appealed to the Benefits Review Board, which affirmed the administrative law judge's decision (Pet. App. 15a-25a). The Board acknowledged the "apparent incongruity" of having a ceiling on the weekly benefits payable to a permanently totally disabled worker but no limitation on the rate of compensation payable to the surviving family should the worker die (*id.* at 18a). Nevertheless, following the administrative law judge's analysis of the legislative history of the 1972 amendments to the Longshoremen's Act benefits structure, the Board concluded that "elimination of the maximum benefit provision from Section 9(e) of the Act * * * was done consciously and intentionally" (*id.* at 22a), and "that failure to substitute a new maximum was * * * a deliberate action" (*id.* at 22a-23a). The Board agreed with the administrative law judge's construction of Section 6(d), limiting its effect on death benefits to the annual upgrading of payments at the *minimum* level established by amended Section 9(e) (*id.* at 23a).

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[3] See 20 C.F.R. 702.301 to 702.318 (1977).

The Director and the employer and insurer sought review by the court of appeals under Section 21(c) of the Act (33 U.S.C. (Supp. V) 921(c)). The court of appeals affirmed the Board's decision, generally following its reasoning (Pet. App. 1a-14a). The court found that Section 6(d) is no more than an ambiguous indication that the Section 6(b)(1) limitations apply to death benefits (*id.* at 7a-8a and n. 5), while Section 9(e) is an unambiguous indication, shown by its legislative history not to have been inadvertent, that death benefit rates are subject to no upper limits (*id.* at 8a-11a). The characterization of the effect of Section 6(d) in the congressional Committee Reports was found to be "overwhelmingly outweighed by the contrary purport of the legislative history as a whole" (*id.* at 8a n.5). The "premium on death" represented by the absence of a maximum weekly rate, the court found, "does appear to have its advocates" (*id.* at 11a-12a and n.8), and is reflected as well in the difference between the *minimum* limitations of Section 6(b)(2) and Section 9(e) (*id.* at 13a-14a and n. 9).

SUMMARY OF ARGUMENT

The court of appeals held that, despite the limitations applicable in cases of disability, when a covered worker dies there is no absolute ceiling on the weekly benefits payable to his dependents. The only limits recognized by the court are those fixed as a percentage of the wages of the deceased by Section 9 (*supra*, pp. 5-6). We submit, on the contrary, that Section 6

(d) (*supra*, p. 5) makes applicable to death cases, like all others (albeit with a slight difference as we explain in a moment), the absolute ceilings announced by Section 6(b)(1) (*supra*, p. 4)—now 200 per cent of the national average weekly wage.

We believe the court's result is at odds with the language of the statute, its legislative history and what may be assumed to have been the congressional intent to avoid disparate treatment.

First, the reasoning of the Board and of the court of appeals makes Section 6(d) of the Act meaningless. That provision refers to "determinations" and says that these "shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits." In the court's view, this means only that "the applicable national average weekly wage" spoken of in Section 9(e) (*supra*, p. 6)—and there made the minimum "base" wage used in calculating death benefits—shall be the current national average most recently determined by the Secretary of Labor under Section 6(b)(3) (*supra*, p. 5). But this is already made clear by Section 10(f) of the Act (33 U.S.C. (Supp. V) 910(f)) for all cases of permanent total disability and death. If Section 6(d) does no more than announce that the minimum benefits in such cases shall be governed by these annual computations, it is entirely superfluous.

In our submission, the true scope of Section 6(d) is made clear in the legislative history of the 1972 amendments, which the court misread. To be sure, Section 9(e) was deliberately written to eliminate a

limitation based on the amount of the employee's *actual* wages that would be considered. But the provision is wholly silent on our question: whether the ceiling imposed by Section 6(b)(1) on the *benefit rate* applies in death cases. That is resolved by the Committee Reports (S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972)):

> To the extent that employees receiving compensation for total permanment [sic] disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in [to the ultimate new maximum weekly benefit rate of 200 per cent of the national average weekly wage], their compensation is to be increased as the ceiling moves to 200 percent.

This explains that, by virtue of Section 6(d), the ceilings apply in a special way to cases of permanent total disability and death. Unlike the compensation for lesser degrees of disability, the minimum rate of benefits for permanent total disability and death is not frozen: it is always to be the specified percentage of the workers' pre-injury wages, adjusted under Section 10(f), subject only to the Section 6(b)(1) limitation *currently* in effect—not that determined for the period during which the injury or death occurred.

Finally, the decision fails to suggest any rational basis for a congressional discrimination against the totally disabled in favor of the survivors of a deceased employee. All indications in the legislative history, as well as the structure of the Act, are that Congress intended to treat these two categories of claims alike.

ARGUMENT

THE WEEKLY RATE OF DEATH BENEFITS UNDER THE AMENDED LONGSHOREMEN'S ACT IS SUBJECT TO THE SAME MAXIMUM LIMITATIONS AS BENEFITS FOR PERMANENT TOTAL DISABILITY.

A. The Issue In Context

1. This case involves the total amount payable each week to the dependents of a deceased worker covered by the Longshoremen's Act. There is no dispute about how the benefit should be apportioned among the survivors, or how long any of them is entitled to receive a share. Nor are we concerned with *minimum* payments: because Dr. Rasmussen was earning relatively high wages, the provisions specifying minimum benefits do not come into play. The only issue is how the *maximum* weekly benefit is determined.

Before the 1972 amendments to the Act, the weekly rate of compensation in *all* cases, whether payable to an injured worker or to the dependents of a deceased worker, was subject to two ceilings, one relative, the other absolute. Except for very low paid workers, the first rule was that weekly benefits could not exceed a stated percentage of actual wages (usually two-thirds thereof). That remains essentially unchanged today. But there was also an absolute maximum, last fixed in 1961 at $70 per week. The 1972 amendments, at least for cases of disability, preserved the absolute ceiling on the amount of weekly benefits, albeit the limit is now fixed in terms of the national average weekly wage rather than a stated sum. The

question in this case is whether the amendments effectively removed any absolute maximum in death cases. We think not. The court of appeals disagreed.

2. Such is the controversy in broad outline. In order to understand the arguments, however, we must examine the statutory scheme more closely. Before the 1972 amendments, Section 6(b) of the Act (33 U.S.C. (1970 ed.) 906(b)) flatly provided in relevant part: "Compensation for disability shall not exceed $70 per week * * *." The corresponding provision for cases in which the covered worker died, Section 9(e) (33 U.S.C. (1970 ed.) 909(e)), stipulated: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 * * *." This effectively fixed the maximum aggregate weekly benefit payable to dependents at the same $70 figure since total payments to the survivors, then as now, could not exceed two-thirds of the worker's weekly wages.[4] See Section 9(b) (33 U.S.C. (1970 ed.) 909(b)). Indeed, the absolute ceiling was lower whenever the worker left fewer than four survivors.[5]

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[4] In the case of a worker earning less than $27 per week, his wages were deemed to be $27 and the benefit payable to his dependents might exceed two-thirds of his actual wages, albeit the benefit could in no event exceed 100 percent of his true wages. Section 9(e).

[5] Section 9(b) allocated 35 percent of the decedent's average wage to the surviving spouse (or the first surviving child) and 15 percent to each child (or additional child), subject to an aggregate maximum of 66 2/3 percent. Thus, applying the arbitrary assumed maximum wage of $105, a widow (or widower) alone could receive no more than $36.75; a widow and one child a total of $52.50; a widow and two children a total of $68.25. The maximum percentage of average wages, two-thirds, was not reached except when the deceased was survived by a dependent spouse and three or more children.

In sum, the weekly benefits in death cases were never greater than those that would have been payable to the worker himself if he had survived totally disabled, and were often less.[6] The court below concluded, however, that the 1972 amendments reversed this pattern.

3. The 1972 amendments deleted both the dollar ceilings on disability benefits in Section 6(b) and the dollar ceiling on wages that could be considered in fixing death benefits in Section 9(e). In Section 6(b), still expressly applicable only to "[c]ompensation for disability," Congress substituted an annually increasing maximum on weekly benefits, measured as a percentage of the national average wage. 33 U.S.C. (Supp. V) 906(b), as amended by Section 5(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1252. But no new ceiling was inserted in Section 9(e), 33 U.S.C. (Supp. V) 909(e), as amended by Section 10(d) of the 1972 Act. Therein lies the rub.

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[6] This relationship between the specified maximum compensation (Section 6(b)) and the specified maximum considered wages in death cases (Section 9(e)) had always existed. Act of July 26, 1956, Sections 1, 4, 70 Stat. 654, 655 ($54 and $81, respectively); Act of June 24, 1948, Sections 1, 3, 62 Stat. 602 ($35 and $52.50, respectively); Act of March 4, 1927, Sections 6(b), 9(e), 44 Stat. 1426, 1430 ($25 and $37.50, respectively).

There are, however, three provisions in the 1972 amendments that relate death benefits to the national average weekly wage. One is the new definition in Section 9(e) of the *minimum* wage assumed for the purpose of calculating death benefits. Instead of $27, it is now provided that the deceased worker's weekly wages "shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) * * *."

The next provision is a general one, Section 10(f), added by the 1972 amendments. It reads as follows:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

This provision makes clear that, in cases of permanent total disability and death, benefits are adjusted upward every year if the national average wage rises. Although Section 10(f) gives the increment to all beneficiaries in these categories of cases, including those unaffected by minimum or maximum, the incidental effect is partially to lift any ceiling and, to the same extent, to raise any floor, which is applicable to such benefits.

Finally, the 1972 amendments added subsection (d) to Section 6:

> Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Plainly, there was a slip of the legislative pen: everyone agrees that "this subsection" should read "this section," or "subsection (b) of this section"—the reference being to the determinations embodied in Section 6(b).[7] It is likewise common ground that Section 6(d), in the case of permanent total disability or death (unlike partial or temporary disability), at least announces one rule (already encompassed by Section 10(f)): that the minimum benefit is not frozen as of the date of the injury or death, but rises annually with the national average wage. Beyond that, however, there is no agreement as to the meaning of Section 6(d).

The court below, following the Board, held that the only "determinations" referred to in Section 6(d) are the annual calculations of the national average

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[7] The obvious reason for the slip is that new subsections (b), (c) and (d) of Section 6 were all set forth in subsection (a) of Section 5 of the amending Act of 1972, 86 Stat. 1252-1253. There are no "determinations" provided for in Section 6(d) itself. See *Director, Office of Workers' Compensation Programs* v. *O'Keefe*, 545 F.2d 337, 344 (C.A. 3); *Director, Office of Workers' Compensation Programs* v. *Boughman*, 545 F.2d 210, 215 (C.A. D.C.); Pet. App. 56a; cf. *id.* at 23a, 7a n. 5.

weekly wage made by the Secretary of Labor pursuant to paragraph (3) of Section 6(b). Hence, according to the court, the only "survivors" affected by Section 6(d) are those receiving the Section 9(e) minimum—*i.e.*, survivors of workers who were earning less than the national average wage; Section 6(d) would impose no ceiling on the survivors of those earning more. On the other hand, we, like the United States Courts of Appeals for the District of Columbia and Third Circuits,[8] read Section 6(d) as making applicable to both total permanent disability and death cases the ceilings announced in Section 6(b)(1)—today 200 per centum of the national average wage. In our view, that construction is compelled by the structure of the statute, its legislative history, and what may be assumed to have been the congressional intent to avoid disparate treatment.

B. The Intent Of Congress

Because the text of the statute is somewhat ambiguous, we turn first to the legislative history of the 1972 amendments.

1. The court below correctly noted that the genesis of the 1972 amendments is to be found in two proposals introduced in 1971. The first of these, represented by a pair of identical bills, S. 2318 and H.R. 12006, would have eliminated all ceilings on benefits (except two-thirds of the employee's wages) in both disability and death cases. S. 2318, 92d Cong., 1st

[8] *Director, Office of Workers' Compensation Programs* v. *O'Keefe, supra; Director, Office of Workers' Compensation Programs* v. *Boughman, supra.*

Sess., Sections 4(a), 10(b) (1971); H.R. 12006, 92d Cong., 1st Sess., Sections 4(a), 10(b) (1971). The other proposal, embodied in a second pair of identical bills, S. 525 and H.R. 3505, would have retained, although substantially increased, the fixed "dollar maximums" in both kinds of cases, and would have continued the pattern of a direct maximum on *compensation* in disability cases and an indirect ceiling on *wages to be considered* in death cases ($119 and $178.50, respectively). S. 525, 92d Cong., 1st Sess., Sections 4(a), 8(c) (1971); H.R. 3505, 92d Cong., 1st Sess., Sections 4(a), 8(c) (1971). Significantly, however, both proposals, despite their considerable differences, would have continued to treat deaths and disabilities in the same way: either both would remain subject to an absolute maximum, or neither would be subject to any maximum (other than two-thirds of the employee's actual wages).

Hearings were conducted on S. 2318 and S. 525 by a subcommittee of the Senate Committee, in May and June 1972,[9] and on H.R. 12006 and H.R. 3505 by a subcommittee of the House Committee in June and July.[10] Predictably, representatives of employee groups uniformly applauded the elimination of maximum benefit levels proposed by S. 2318 and H.R.

[9] Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (1972).

[10] Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess. (1972).

12006, while representatives of employers and insurance industry groups uniformly opposed such elimination, urging retention of some maximum in both kinds of cases. But, as one would expect, not a single witness suggested different treatment of disability cases and death cases, when urging retention or elimination of maximum limitations on weekly benefits. Nor did any member of the subcommittees that conducted the hearings do so.

Obviously, the ultimate solution was a compromise between the two extreme positions. There is, however, no basis for concluding that the form of the compromise was to retain a ceiling in disability cases while eliminating it in death cases. On the contrary, every indication is that the accommodation between conflicting points of view was to retain a maximum in all cases, but to fix it high and to allow it to rise with the national level of wages.

That idea was first suggested in the Senate Hearings in May 1972 by an industry representative and it was well received by the Chairman of the subcommittee. Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Senate Hearings), 92d Cong., 2d Sess. 171-172, 174-175, 177 (1972).[11] Significantly, the proposal covered both dis-

[11] Mr. Ralph M. Hartman of the Bethlehem Steel Corporation was the spokesman:

> * * * [A] number of States have recently removed a fixed-dollar maximum and set the maximum rate at two-thirds of the State average weekly wage; two-thirds of the man's average wage, subject to a maximum of two-thirds of the State average weekly wage.
>
> We recognize the intent of the proposal, and we suggest for your consideration that the maximum weekly benefit be predicated upon the average weekly wage in the shipbuilding and ship repair industry, that it be 66 and two-thirds percent of the injured employee's average weekly wage as computed under section 10, subject to a maximum of 150 percent of the average weekly wage of the shipbuilding and ship repair industry.

Mr. Hartman made the point more fully in his written statements. Senate Hearings, *supra*, at 182-183, 196-197, 203-204, 214-216, 218.

ability and death cases. Senate Hearings, *supra*, at 203-204, 218. A like presentation was made by the same spokesman to the House Subcommittee in July, again covering both disability and death cases. Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor (House Hearings), 92d Cong., 2d Sess. 68, 73, 74, 75, 77, 79-80 (1972). Here, we assume, was the origin of the compromise that emerged.

There was, however, one further ingredient to come. The industry representative had suggested fixing the ceiling for benefits at 150 percent of the current average wage in the shipbuilding and ship repair industry, as established from time to time by the reports of the Bureau of Labor Statistics. But he had not proposed the three-year "phase-in" of a ceiling—from $70 to 200 percent of the national average wage—that was ultimately adopted. This concept, and much else, was obviously adopted from the *Report of the National Commission on State Workmen's Compensation Laws* (*Commission Report*), issued in July 1972.

It is clear this report, commissioned by Congress,[12] had an important influence on the legislation. Its publication at the end of July, after the close of the public committee hearings, no doubt gave it a special place in the deliberations that followed. In all that concerns us, the statutory text, identical in both the Senate and House versions, was finally settled by September when the Committee Reports were issued. See S. Rep. No. 92-1125, 92d Cong., 2d Sess. 27-67, 30-31, 39-40, 41-42 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 24-64, 28, 36-37, 38-39 (1972).[13] The critical provisions, those amending Sections 6, 9 and 10 of the Act, had been radically amended. The only intervening event was the Commission's report, and the Committee Reports make it clear that it was used as the model. See S. Rep. No. 92-1125, *supra*, at 2, 4, 5; H.R. Rep. No. 92-1441, *supra*, at 2. We accordingly turn to that report.

Although expressing some "unease" about the principle, *Commission Report*, *supra*, at 38, the report, in all its recommendations, accepts the need for an absolute ceiling on weekly benefits in all cases, including death cases. *Id.* at 19, 20, 60-62, 64-65, 71-72. The proposed maximum is tied to the average wage within

[12] See Occupational Safety and Health Act of 1970, Section 27, 84 Stat. 1616, 29 U.S.C. 676.

[13] The amended bill, as reported on September 13, 1972, was passed by the Senate the next day. 118 Cong. Rec. 30670, 30674 (1972). The House version, as reported on September 25, was passed on October 14. 118 Cong. Rec. 36376, 36389 (1972). The Senate concurred in the House version (118 Cong. Rec. 36265, 36274 (1972)) and the bill was signed into law on October 27.

the jurisdiction, to be gradually increased until it is fixed at 200 percent of the average wage. See Recommendations 3.8, 3.9, 3.15, 3.16, 3.20, 3.21, *id.* at 62, 64-65, 71-72. What is more, the identical formula is suggested for both disability and death cases. *Ibid.* As the Commissioners explained: "We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases * * *." *Commission Report*, *supra*, at 71. Finally, for permanent total disability and death cases—but not cases of lesser disability—the *Commission Report* recommends "that beneficiaries * * * have their benefits increased through time in the same proportion as increases in the State's average weekly wage." Recommendations 3.14, 3.22, *id.* at 64, 71.

Here, quite obviously, is the source of the "phase-in" maximum announced in Section 6(b) of the Act and of the annual adjustments in permanent total disability and death cases provided for in Section 10 (f). See S. Rep. No. 92-1125, *supra*, at 4. It would be most surprising if, having accepted so much, the Ninety-Second Congress rejected, without explanation or even mention, the *Commission Report's* conclusion that the same considerations "are equally applicable in death cases." Especially so, when the Senate Committee that drafted the final bill reported its belief "that the provisions of this bill are fully consistent with the recommendations of the National Commission [on State Workmen's Compensation Laws]." S. Rep. No. 92-1125, *supra*, at 2. The available evidence

is that the draftsmen of the 1972 amendments intended to follow the Commission in preserving a ceiling on death benefits like all others. If they meant to do otherwise, they were unusually quiet about it.

2. To be sure, it is conceivable that Congress changed the rule without flagging its action or explaining its reasons. But to indulge that assumption is made the more difficult because we cannot readily surmise what considerations would be thought to justify lifting the ceiling altogether in death cases alone.

The court below saw the difficulty and sought to overcome it (Pet. App. 11a-12a). Following the Administrative Law Judge (Pet. App. 60a-61a), the court suggested that the *Commission Report* had recognized arguments "in favor of dispensing with maximum limitations in the case of death while retaining them for disability" (Pet. App. 11a). We do not so read the passage referred to (*Commission Report*, *supra*, at 71):

> The Proportion of Lost Remuneration to be Replaced
>
> In most States, but not all, the proportion of the worker's weekly wage replaced by death benefits varies with the number of dependents. Section 18 of the Model Act provides that a surviving spouse will receive 50 percent of the weekly wage of the deceased; a widow or widower with two children under 18 receives 75 percent of the weekly wage; two orphans receive 50 percent of the deceased's weekly wage, and so on.
>
> Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivation problems, which suggests that replacement of more than the normal 66⅔ percent of lost wages is appropriate. The considerations that suggest the proportion of lost wages to be replaced in death cases should be greater than, or less than, the proportion in total disability cases seem to be roughly in balance.
>
> As in the total disability cases, wages lost by death cases are not necessarily the same as spendable income lost. A formula which relates death benefits to spendable earnings would take account of the impact of taxes and also would automatically adjust the benefit in response to the number of surviving dependents.

Very clearly, it seems to us, the Commission is not here discussing whether there ought to be any absolute maximum on weekly benefits: that is treated in the following section entitled "Maximum Weekly Benefit," with the conclusion we have already quoted. *Id.* at 71-72.[14] The portion of the Report relied upon by

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[14] The full text is as follows:

> Maximum Weekly Benefit
>
> The Model Act provides that the maximum weekly benefit in death cases shall be equal to two-thirds of the

the court of appeals is merely alluding to the arguments for and against fixing the *maximum percentage of actual wages* paid in death cases above or below the usual two-thirds. Concluding that the conflicting considerations are "roughly in balance," the Commission makes the same recommendation as for disability cases, but expressly "subject to the State's maximum weekly benefit." *Ibid.*

One cannot find anywhere in the National Commission's report any proposal for removing the ceiling on death benefits. Nor are we aware of any suggestion, from any source, that benefits for disability should be subject to a maximum, but not death benefits. Cer-

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State's average weekly wage. We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases, and therefore:

R3.23

We recommend that as of July 1, 1973, the maximum weekly death benefit be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.24

We recommend that as of July 1, 1977, the maximum weekly death benefit be at least 133 1/3 percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least 166 2/3 percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

tainly, no such scheme was urged upon the relevant congressional committees. In these circumstances, it seems to us, the Court of Appeals for the District of Columbia Circuit was justified in concluding (*Boughman, supra*, 545 F.2d at 213) that:

> Congress did not intend to provide, without ever so stating and in sharp contradistinction to every previous version of the Act, that a totally disabled employee, in need of continuing care, should be compensated less generously than the family of an employee who dies. It is hardly within the policy of this Act to place a premium on death. [Footnote omitted.]

3. As it happens, however, we need not rely on silence alone. The Committee Reports are explicit that death benefits, like compensation for permanent total disability, are subject to the ceilings announced in Section 6(b)(1). In identical passages, the S. Rep. No. 1125, *supra*, at 5 and the H.R. Rep. No. 1441, *supra*, at 3 explain:

> To the extent that employees receiving compensation for total permanment [sic] disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased as the ceiling moves to 200 percent.

There is nothing ambiguous in these statements. Plainly, Congress believed it had imposed the maximum announced in Section 6(b)(1) on death benefits: else, there was no cause to provide, with respect to "survivors," that "their compensation is to be in-

creased as the ceiling moves to 200 percent." The congressional intent is perfectly clear.

C. The Text Of The Statute

We may be sure what Congress intended. But it remains to determine whether that intention was translated into the text of the 1972 Act. We submit it was—albeit not in the most direct way.

1. *The silence of Section 9(e)*

As we have seen, Section 9(e) of the Longshoremen's Act, before 1972, provided both a floor and a ceiling on survivor benefits by the device of fixing arbitrary minimum and maximum wages ($27 and $105) that would be considered in calculating the benefit payable to dependents after the worker's death. And we know that the 1972 amendment to Section 9(e) substituted a new minimum, defined in terms of the national average wage, but no new maximum. That is the primary basis of the holding that there is now no upper limit (except the deceased's actual wages) on death benefits.

Undeniably, the most obvious place to stipulate a maximum on death benefits was in Section 9(e), where the new minimum is announced and where the old maximum was specified. We cannot adequately explain the omission. Perhaps the answer lies in the fact that the new ceiling (unlike the new minimum) was to be defined as a direct limit on *benefits* payable to the survivors, rather than the maximum wages that would be considered. Thus, the new formula

would not conveniently fit in the place of the old: one cannot insert a direct ceiling on benefits in a sentence that begins, "[i]n computing death benefits the average weekly wages of the deceased shall be considered to have been not more than * * *."

Of course, notwithstanding the resulting asymmetry, a new sentence could have been added setting forth the new ceiling. It may have been intended, and overlooked. But it cannot matter whether the new ceiling is announced in the most appropriate place, so long as we can find it somewhere in the statute. We submit the relevant provision, perhaps misplaced, is to be found in Section 6(d).

2. *Section 6(d)*

Read alone, Section 6(d) does not immediately reveal its meaning. Nothing in the provision clearly resolves whether the "determinations" spoken of are only the annual computations of the national average wage provided for in Section 6(b)(3), or also encompass the statutory "determinations" of the applicable ceilings—from 125 percent to 200 percent of the national average wage—set forth in Section 6(b)(1). Nor can we be sure, without other evidence, whether the "periods" referred to relate to the transition years of the phase-in or merely the continuing annual adjustments of the national average wage. But the otherwise obscure language of Section 6(d) takes on meaning when we look to related provisions.

One thing is clear: Section 6(d) applies to both permanent total disability benefits and death benefits, but not to cases of lesser disability. See Pet. App. 7a n. 5, 56a-57a. Yet, Section 10(f) also applies only to these same categories of beneficiaries and it increases payments annually in accordance with the determinations made under Section 6(b)(3)—whether the beneficiaries are affected by the minimum provisions, the maximum provisions, or neither. And Section 10(h) makes it clear that, in the same cases, beneficiaries of awards made before the new amendment shall be entitled to adjustments and, thereafter, will also receive the annual increases.[15] This leaves

[15] Section 10(h), 33 U.S.C. (Supp. V) 910(h), added by Section 11 of the 1972 amendments, reads as follows:

> (1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability

no work for Section 6(d) if it means no more than that the permanently disabled and the survivors of deceased workers shall enjoy the annual increases computed under Section 6(b)(3). So read, the provision is mere surplusage.

There is another consideration. If Section 6(d) refers only to the increment in the national average wage, it holds down to the ceiling applicable at the date of injury all those who became permanently and totally disabled before October 1, 1975. Thus, a high wage earner injured in early 1973, suffering permanent total disability, could never receive more than

> at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.
>
> (2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.
>
> (3) For the purposes of subsections (f) and (g) an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection shall be considered to have occurred on the day following such enactment date.

125 percent of the then national average wage—even though today the ceiling has been raised to 200 percent and the average wage has substantially increased. See n. 3, *supra*. That result would be inconsistent with the general scheme of the Act and contrary to every indication of the legislative history. Yet, no other provision of the Act gives him the benefit of the phase-in, if Section 6(d) does not. The only solution, therefore, is to read Section 6(d) as reaching the phase-in provisions of Section 6(b)(1). And, of course, once we do that for cases of permanent total disability, we must construe the provision in the same way for death cases. The consequence is that the ceilings there announced "apply to * * * survivors * * * receiving * * * death benefits."

The road may be tortuous. But, at the end, the statute says what Congress plainly intended.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded for modification of the award of compensation by the imposition of the limitations of Section 6(b)(1), in the manner provided by Section 6(d), of the Longshoremen's Act.

Respectfully submitted.

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AUGUST 1978.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
AUG 8 1978

No. 77-1491

GEO CONTROL, INCORPORATED and
NEW HAMPSHIRE INSURANCE COMPANY,
Petitioners,

vs.

GENEVIEVE O. RASMUSSEN and
WILLIAM C. RASMUSSEN, JR.,
Respondents.

No. 77-1465

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR,
Petitioner,

vs.

GENEVIEVE O. RASMUSSEN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS GEO CONTROL, INCORPORATED and NEW HAMPSHIRE INSURANCE COMPANY

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1491

GEO CONTROL, INCORPORATED and
NEW HAMPSHIRE INSURANCE COMPANY,
Petitioners,

vs.

GENEVIEVE O. RASMUSSEN and
WILLIAM C. RASMUSSEN, JR.,
Respondents.

No. 77-1465

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

GENEVIEVE O. RASMUSSEN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS GEO CONTROL, INCORPORATED and NEW HAMPSHIRE INSURANCE COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 565 F. 2d 1385. The opinion is printed in Appendix A, pp. 1a-14a, of the Petition for a Writ of Certiorari, No. 74-1465, filed April 14, 1978, by the Solicitor General on behalf of the Director, Office of the Workers' Compensation Programs, United States Department of Labor, requesting review of the same decision. The opinion of the Benefits Review Board, printed in Appendix B, pp. 15a-25a, of the Solicitor General's Petition is reported at 1 BRBS 378. The opinion of the administrative law judge, printed in Appendix C, pp. 26a-74a, of the Solicitor General's Petition, is unreported. Petitioners incorporate by this reference as if set forth in full the Appendices printed in the Solicitor General's Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1978. The petition for a writ of certiorari in No. 77-1465 was filed April 14, 1978, by the Solicitor General on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor. The petition for a writ of certiorari in No. 77-1491 was filed April 19, 1978, by Geo Control, Incorporated and New Hampshire Insurance Company. The petitions were granted and the cases consolidated on June 12, 1978. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether death benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, are limited to the same maximums as disability benefits?

STATUTES INVOLVED

The relevant pre-1972 provisions of the Longshoremen's and Harbor Workers' Compensation Act[1] appear in the left-hand column, while the same sections as amended and new sections appear in the right-hand columns. Changes as a result of the 1972 amendments[2] are printed in italics.

PRE-1972	POST-1972
Section 9.[3] . . .	Section 9.[4] . . .
If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:	If the injury causes death, or *if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury,* the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
• • • • •	• • • • •

---

[1] 44 Stat. 1426 as amended 75 Stat. 203, 33 U.S.C. 901 (1970).

[2] Pub. L. 92-576, §22, 86 Stat. 1251 (effective November 26, 1972).

[3] 33 U.S.C. 909 (1970).

[4] 33 U.S.C. 909 (Supp. V).

PRE-1972

(b) If there be a surviving wife or dependent husband and no child of the deceased to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in the case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66⅔ per centum of such wages.

POST-1972

(b) If there be a *widow or widower* and no child of the deceased to such *widow or widower 50* per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of *16⅔* per centum of such wages for each child; in the case of the death or remarriage of such *widow or widower,* if there be one surviving child of the deceased employee, such child shall have his compensation increased to *50* per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, *50* per centum of such wages increased by *16⅔* per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such

PRE-1972

POST-1972

a requirement the appointment of a guardian for such purposes shall not be necessary.

• • • • • • • • • • •

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*

Section 6.[5] . . .

(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: Provided, however, That if the employee's average weekly wages, as computed under section 10 are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

Section 6.[6] . . .

(b)(1) Except as provided in subsection (c), compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

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[5] 33 U.S.C. 906 (1970).
[6] 33 U.S.C. 906 (Supp. V).

PRE-1972

POST-1972

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

(c) The maximum rate of compensation for a nonap-

PRE-1972

POST-1972

priated fund instrumentality employee shall be equal to 66⅔ per centum of the maximum rate of basic pay established for a Federal employee in grade GS—12 by section 5332 of title 5, United States Code, and the minimum rate of compensation for such an employee shall be equal to 66⅔ of the minimum rate of basic pay established for a Federal employee in grade GS—2 by such section.

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

STATEMENT

This case arises out of a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act,[1] as extended by the Defense Base Act. 55 Stat. 622, 42 U.S.C. 1651 (1970). The facts are not in dispute and were stipulated by the parties.

William C. Rasmussen worked as a hydrologist for petitioner Geo Control, Incorporated, under a public

[1]Hereinafter also referred to as the Act or the Longshoremen's Act.

works contract between his employer and the United States. The employer was insured for workers' compensation liability by petitioner New Hampshire Insurance Company.

On May 11, 1973, while riding as a passenger in a jeep, Rasmussen was killed by a landmine explosion in South Vietnam. At the time of his death his average weekly wage was $798.00. Respondents, Genevieve O. Rasmussen and William C. Rasmussen, Jr., are his surviving widow and son. The employer and insurance carrier agreed to the survivors' entitlement to weekly death benefits, but a dispute arose as to the amount of benefits.

The claim was accordingly referred to an administrative law judge for hearing. In his decision of October 24, 1974, the administrative law judge ruled that the weekly amount of death benefits was determined only under Section 9 at a percentage of the employee's average weekly wage. He awarded to the widow 50% of the decedent's average weekly wage and to the son 16⅔% of the average weekly wage for a total weekly benefit of $532.00.

In making this award against petitioners, the administrative law judge rejected the contention advanced by petitioners and the Director, Office of Workers' Compensation Programs, who joined with petitioners in urging that under proper statutory interpretation, death benefits are limited by the same maximum as inter vivos, disability benefits. The employer and insurer contended that ever since the enactment of the original legislation in 1927, disability and death benefits were subject to identical limi-

tations. They urged that even though the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act did not include an expressly stated monetary maximum for death benefits in Section 9, when that Section is read together with Sections 6(b) and (d), it establishes a maximum identical to disability benefits. Application of this maximum would have resulted in an initial weekly benefit of $167.00, instead of the weekly benefit of $532.00 awarded.

Upon the employer and insurer's petition for review, the Benefits Review Board affirmed. It acknowledged that the absence of an identical maximum for death benefits created an anomalous situation, conceding that thereby benefits to the survivors of an employee would be greater than the disability payments to the same employee if he were permanently and totally disabled. Solicitor General's Petition, App. B, p. 18a.

The Court of Appeals for the Ninth Circuit affirmed the Board's decision on the grounds that the language of Section 9 of the Act did not explicitly contain a maximum dollar limitation on death benefits, and that the greater weight of the legislative history disclosed no intent of Congress to apply disability maximums to death benefits. The court specifically recognized and rejected the contrary views of the Third[8] and District of Columbia[9] Circuit Courts of Appeals.

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[8] *Director, Office of Workers' Compensation Programs v. O'Keefe*, 545 F. 2d 337 (3d Cir. 1976).

[9] *Director, Office of Workers' Compensation Programs v. Boughman*, 545 F. 2d 210 (D. C. Cir. 1976).

ARGUMENT

I

THE MOST REASONABLE AND LOGICAL INTERPRETATION OF THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT LIMITS BENEFITS FOR DISABILITY AND DEATH TO THE SAME MAXIMUM.

This petition raises an important question of statutory construction under the Longshoremen's and Harbor Workers' Compensation Act. In the hope of clarifying the complex structure of the benefits scheme under the pre-1972 and post-1972 Act, the employer again sets forth in an abbreviated fashion the sections chiefly at issue. Changes as a result of the 1972 amendments are printed in italics.

PRE-1972	POST-1972
Section 9. Compensation for death . . .	Section 9. Compensation for death . . .
(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.	(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*
Section 6. . . .	Section 6. . . .
(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: Provided, however,	*(b)(1) Except as provided in subsection (c), compensation for disability shall not exceed the following percentages of the applicable national average weekly*

PRE-1972	POST-1972
That if the employee's average weekly wages, as computed under section 10 are less than $18 per week he shall receive as compensation for total disability his average weekly wages.	*wage as determined by the Secretary under paragraph (3):* *(A) 125 per centum or $167, whichever is greater during the period ending September 30, 1973.* *(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.* *(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.* *(D) 200 per centum beginning October 1, 1975.* *(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.*

• • • • •

PRE-1972	POST-1972
	(b) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

The Act, as amended, speaks explicitly only of a minimum amount for death and inter vivos disability benefits and of maximum amount only for disability benefits. As recognized by all three Circuit Courts of Appeals,[10] Section 9 no longer expressly provides a maximum benefit for death claims. The conflict among the same lower courts, thus focuses upon the issue of whether the absence of an express maximum in Section 9, can be interpreted as Congressional intent to eliminate any upper limits for death benefits.

The right and duty of this Honorable Court to ascertain Congressional intent is well established.[11] Thus statutory language,[12] the purpose of the enactment,[13]

[10] *Rasmussen*, 567 F. 2d at 1387, Solicitor General's Petition, App. A at 6a; *Boughman*, 545 F. 2d at 213; *O'Keefe*, 545 F. 2d at 341.

[11] *Caminetti v. United States*, 242 U.S. 470 (1916).

[12] *United States v. Oregon*, 366 U.S. 643, 648 (1961).

[13] *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 284, 390-395 (1951).

legislative history[14] and all other evidence of Congressional intent may be considered.[15] It is respectfully submitted that the decision below in erroneously concluding the death benefits are not limited to the same maximum as disability benefits is contrary to the only persuasive logical, historical and social evidence of Congressional intent.

A. The 1972 amendments should be reasonably interpreted to avoid an absurd and discriminatory consequence.

The illogical and unreasonable effect of finding no absolute limit of death benefits is immediately apparent. If the decedent herein had sustained a serious, nonfatal injury which had resulted in a permanent, total disability, then he and his dependent wife and child would receive benefits subject to the maximum provided in Section 6(b), initially $167.00 per week, now 200% of the national average of the weekly wage. The court below reasons, however, that the same dependents in the event of the employee's death receive benefits of $532.00 unlimited by a fixed maximum.

We respectfully submit that there is no persuasive evidence that Congress intended to create this startling and incongruous disparity. Such an inequitable classification would discriminate against "totally disabled employees in need of continuing care," who

[14] *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

[15] *United States v. American Trucking Association*, 310 U.S. 534, 542-544 (1940).

would be "compensated less generously than the family of an employee who dies." *Boughman,* 545 F. 2d at 213. Such a result is contrary to common sense and logic.

B. The decision of the court below is a radical departure from the historical purposes and social policy of the Act and all other similar workers' compensation statutes.

Additional evidence of the error below is demonstrated by an historical examination of the Act in context of past and present social policy. The original legislation[16] was enacted in 1927 as a result of prior, unsuccessful efforts by the States[17] and by Congress[18] to extend the coverage of state workers' compensation statutes to maritime employees. Passage of the Act was at the concluding phase of a movement during the preceding two decades, such that by 1920 all but eight states had replaced the jury system of tort liability with basically similar administrative compensation schemes.[19] The historical factors leading to the enactment of those compensation

[16]Act of March 4, 1927, c. 509, 44 Stat. 1424.

[17]*Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917) (New York Workmen's Compensation Act could not be extended consistent with the United States Constitution to provide benefits on behalf of an employee killed aboard a ship whose cargo he was unloading). See discussion in GILMORE AND BLACK, THE LAW OF ADMIRALTY (1975 ed.) at 405.

[18]*Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920) (Congressional addition to the "Saving to Suitors" clause of a phrase preserving for longshoremen rights and remedies under state workmen's compensation acts invalid delegation of federal powers to states). See discussion, GILMORE & BLACK, *supra,* at 407.

[19]1 LARSON, WORKMEN'S COMPENSATION LAW §5.30 at 39 (1978 ed.).

laws and the Longshoremen's Act involved a trade-off among all persons affected by industrial injuries.[20]

For the employer, compensation statutes imposed liability and payment without regard to their fault. In exchange the amount paid was typically less than an adverse jury verdict and also predetermined under a schedule of benefits. Private insurance became an available means by which the employer was able to transfer the costs of premium to the cost of production and ultimately to the consumers of the product.

For employees the time consuming delays of the litigious tort process were reduced. Even though some employees under the tort system obtained large verdicts, the great majority of pre-compensation claims were thwarted by the common law defenses available to the employer. Under the compensation system the employee concurrently lost his or her right to recover for care, comfort, pain, suffering, companionship and other elements of damage recognized in tort, but gained the right to receive prompt payment of physicians', hospitals' and other medical expenses. Also guaranteed to employees was the replacement of wages lost during periods of convalescence and disability.

[20]GILMORE & BLACK, *supra,* at 410. See generally 1 LARSON, *supra,* Chapter 1 "The Nature of Workmen's Compensation," and Chapter 2 "Development of Workmen's Compensation," at 1-40 (1978 ed.); THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (Washington, D.C.; July, 1972), Chapter 1, Section A, "The Basic Nature of Workmen's Compensation," and Section B, "The Origins of Workmen's Compensation in America," at 32-35.

The replacement of the lost wages provided the necessary financial assistance to prevent the injured worker and his or her family from becoming destitute and dependent upon public assistance. The wage loss replacement was automatically paid, but under every every state[21] and federal[22] compensation scheme subject to minimum and maximum amounts. The minimum affected only low income employees, who as a result thereof were at least assured of receiving some benefits. The maximum affected only high income employees, who received less than their pre-injury salary and were thereby motivated to return to gainful employment at the earliest possible date.

The principle of compensation, subject to a benefit maximum, as the replacement of lost wages was thus a chief feature of the original Act and all other similar compensation systems. Compensation was even defined in the Act as the benefit payable to the employee for disability and to his or her dependents for death.[22a] Disability and death benefits were also juxtaposed in other sections of the Act relating to injury,[23] coverage,[24] notice of the employee to the employer,[25]

[21]All state workers' compensation laws have retained an absolute dollar maximum for death benefits. Chamber of Commerce of the United States, ANALYSIS OF WORKMEN'S COMPENSATION LAWS (1975 ed.) Chart VII: Fatalities—Income Benefits For Spouse and Children.

[22]Federal Employers Compensation Act, 5 U.S.C. §§ 8109, 8133; Social Security Act, 42 U.S.C. § 402(e) (2); Veterans Benefits Act, 38 U.S.C. §§ 314, 322, 334, 342.

[22a]44 Stat. 1424, as amended, 33 U.S.C. 902(12) (1970 ed.).

[23]44 Stat. 1424, as amended, 33 U.S.C. 902(2) (1970 ed.).

[24]44 Stat. 1426, as amended, 33 U.S.C. 903 (1970 ed.).

[25]44 Stat. 1431, as amended, 33 U.S.C. 912 (1970 ed.).

the time for filing of the claims,[26] the employer's record keeping requirements,[27] reports of injury[28] and accidents where third parties were liable.[29] The similarity of treatment to the employee in the case of disability and his or her dependent survivors in the case of death was underscored by the maximum benefit for which both classes of beneficiaries was identical in the original Act.[30]

Every subsequent amendment[31] to the minimum and maximum maintained the exact parity of benefits for disability and for death. Even though the permanently and totally disabled employee or an employee fatally injured would never reenter the labor market, the maximum applied equally to both, thus recognizing that compensation benefits were to replace only lost wages. Similarly for highly paid employ-

[26]44 Stat. 1432, as amended, 33 U.S.C. 913 (1970 ed.).

[27]44 Stat. 1438, as amended, 33 U.S.C. 929 (1970 ed.).

[28]44 Stat. 1439, as amended, 33 U.S.C. 930 (1970 ed.).

[29]44 Stat. 1440, as amended, 33 U.S.C. 933 (1970 ed.).

[30]The original Act provided that compensation benefits for disability were not to exceed $25.00 per week. Act of March 4, 1927, c. 509, § 6(b), 44 Stat. 1426. The maximum compensation benefit for death was 66⅔% of the employee's average weekly wage, considered to be not more than $37.50 per week. Act of March 4, 1927, c. 509, § 9(c), 44 Stat. 1430. Thus the maximum amount for disability and death was identical. 66⅔% x $37.50 = $25.00.

[31]The next amendment in 1948 provided that disability benefits were not to exceed $35.00 per week. The maximum compensation for death was 66⅔% of the employee's average weekly wage, considered to be not more than $52.50. Act of June 24, 1948, c. 629 §§ 1, 3, 62 Stat. 602. Thus the maximum for disability and death benefits retained the identical limit. Subsequent amendments raised the benefits, but did not disturb this relationship of maximum disability and death compensation. Act of July 26, 1956, c. 735, §§ 1, 4, 70 Stat. 654, 655 ($54 and $81); Act of July 14, 1961, Pub. L. 87-87, §§ 1, 2, 75 Stat. 203 ($70 and $105).

ees, compensation benefits would only partially replace the lost wages.

It is respectfully submitted that the interpretation of the 1972 Amendments by the court below is a dramatic deviation from this historically persuasive evidence of Congressional intent and is also contrary to social policies which Congress wished to implement through the 1972 Amendments.

C. The decision below is contrary to the intent of Congress to implement a modern workers' compensation system based upon the recommendations of the National Commission on State Workmen's Compensation Laws.

The decision below also frustrates the Congressional intent to implement a modern workers' compensation system consistent with the recommendations of The Report by the National Commission on State Workmen's Compensation Laws.[32] Prior to the 1972

[32]The National Commission on State Workmen's Compensation Laws was created by Congress under the Occupational Safety and Health Act of 1970. December 29, 1970 Pub. L. 91-596, § 2, 84 Stat. 1590, 29 U.S.C. 651 (1970). The Commission was comprised of fifteen Presidential appointees from state workers' compensation agencies, industry, labor and medicine. The National Commission on State Workmen's Compensation Laws shall hereinafter be referred to as the National Commission.

The Congressional declaration of policy and statement of purposes provided in pertinent part as follows:

> The Congress hereby finds and declares that
>
> (A) the vast majority of American workers and their families are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation; and
>
> (B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living. 84 Stat. 1616, 29 U.S.C. 676(a)(1) (1970).

Amendments the level of benefits was almost universally recognized as inadequate to provide a minimally sufficient income for disabled employees and their dependents.[32a] The last increase in the dollar maximum in compensation payments was in 1961.[33] While Congress also wished to solve coverage problems unique to the maritime worker and his third party litigation with vessel owners and stevedores,[34] revision of the benefits structure was of paramount importance.

In seeking to improve the level of benefits, Congress, its committees[35] and the sponsors[36] of the legis-

[32a]LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, HEARINGS BEFORE THE SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE ON S.2318, S.525 and S.1547, 92 Cong., 2d Sess. at 1. (Hereinafter cited as HEARINGS).

[33]July 14, 1961 Pub. L. 87-87, §§ 1, 2, 75 Stat. 203.

[34]See discussion in *Northeast Marine Terminals Co., Inc. v. Caputo*, 432 U.S. 249, 256-265; 53 L.Ed. 320, 329-334; 97 S.Ct. 2348, 2353-2358 (1977) by Mr. Justice Marshall.

[35]SENATE REPORT No. 92-1125, 92d Cong., Sess. (1972) (hereinafter referred to as S. REP. No. 92-1125) prepared by the Committee on Labor and Public Welfare states as follows:

> *Maximum and minimum benefit amounts*
>
> The basic requirement of the Act is for the injured worker to receive 66⅔% of his average weekly wage. Historically this ⅔ requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. As a result of the 12 year freeze on increasing benefits under this Act the present $70 maximum results in few workers receiving ⅔ of their average weekly wages and many workers receiving as low as 30% of their average weekly wage.

lation which became law, all relied upon and endorsed the recommendations of The Report by the National Commission. The court below refers to that Report, but we submit, misinterprets and overlooks the portion of The Report dispositive of the issue herein presented.

Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor. The expectation is that a 200% maximum will enable approximately 90% of the work force covered by this Act to receive ⅔ of their average weekly wage. In order to ease the adjustment of these benefits which at a minimum will result in doubling the compensation payment for most covered workers, the bill provides a phase-in in four steps as follows: 125 percent or $167 whichever is greater during the period ending September 20, 1973; 150 percent during the period beginning October 1, 1973 and ending September 30, 1974; 175 percent during the period beginning October 1, 1974 and ending September 30, 1975; and 200 percent beginning October 1, 1975. These maximums meet the recommended standards of the National Commission on State Workmen's Compensation Laws. (Emphasis in original, underscoring added).

[36]Immediately prior to the final Senate vote on the proposed amendments Senator Williams, one of the Bill's co-sponsors and Chairman of the Committee on Labor and Public Welfare, stated as follows:

"The National Commission on Workmen's Compensation laws which we created in passing the Occupational Health and Safety Act of 1970 has submitted a comprehensive report and recommendation of the need to upgrade workmen's compensation standards nationwide including if necessary the imposition of Federal standards.

"In the limited but significant area covered by the Longshoremen [sic] Act we have attempted to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission.

"I shall in the near future be giving careful consideration to a measure which will implement or improve upon the National Commission's recommendation and I certainly expect to use the improvements in this bill as a model." LEGISLATIVE HISTORY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972 (G.P.O. 1972) at 372. (Hereinafter referred to as LEGISLATIVE HISTORY).

The recommendations of the National Commission for the four basic types of compensation benefits appear in Chapter 3 at pages 53-75. In the introduction of that section, the National Commission recommends benefits for all types of compensation at 80% of the employee's spendable income or 66⅔% of the employee's gross weekly wage, "subject to the State's maximum weekly benefit."[37] The report then specifically discusses temporary total, permanent total, permanent partial and death benefits with the recommendation for the last named as follows:

Maximum Weekly Benefit

The Model Act provides that the maximum weekly benefit in death cases shall be equal to two-thirds of the State's average weekly wage. We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases, and therefore:

We recommend that as of July 1, 1973, the maximum weekly death benefit be at least 66⅔ percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

We recommend that as of July 1, 1977, the maximum weekly death benefit be at least 133⅓ percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least 166⅔ percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.[38]

---

[37]REPORT OF THE NATIONAL COMMISSION at 56, 57.

[38]*Id.* at 71, 72.

Neither the National Commission, nor Congress by its reliance upon the recommendations, disturbs the fundamental concept of compensation as a replacement of lost wages, subject to an identical maximum for all classes of employees and dependents.

The opinion below omits any reference to this recommendation and instead excerpts[39] portions of the immediately preceding section entitled, "The Proportion of Lost Remuneration to be Replaced." This entire section is set forth in the margin[40] with under-

[39] *Rasmussen*, 567 F. 2d 1390, footnote 8; Solicitor General's Petition, App. A, at 12a.

[40] **E. DEATH BENEFITS**

Work-related deaths account for less than one percent of all workmen's compensation claims and less than 10 percent of all benefits. As the ultimate tragedy, work-related death deserves full compensation. The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program.

The Proportion of Lost Remuneration to Be Replaced

In most States, but not all, the proportion of the worker's weekly wage replaced by death benefits varies with the number of dependents. Section 18 of the Model Act provides that a surviving spouse will receive 50 percent of the weekly wage of the deceased; a widow or widower with two children under 18 receives 75 percent of the weekly wage; two orphans receive 50 percent of the deceased's weekly wage, and so on.

Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivation problems, which suggests that replacement of more than the normal 66⅔ percent of lost wages is appropriate. *The*

scoring added beneath the language excerpted by the opinion below. A comparison of the discussion by the National Commission relating to the percentage of lost wages to be replaced versus the maximum weekly benefit discloses that the court's analysis fails to support the conclusion that Congress intended to abolish an identical maximum for death benefits. The decision below thus disrupts a proper and consonant interpretation of the Act consistent with fundamental principles of workers' compensation fixing identical maximum benefits for permanently disabled employees and their dependent survivors.

The finding of the court below providing inconsistent maximums contradicts the acknowledgement by

considerations that suggest the proportion of lost wages to be replaced in death cases should be greater than, or less than, the proportion in total disability cases seem to be roughly in balance.

As in the total disability cases, wages lost by death cases are not necessarily the same as spendable income lost. A formula which relates death benefits to spendable earnings would take account of the impact of taxes and also would automatically adjust the benefit in response to the number of surviving dependents.

[R3.20] We recommend that, subject to the State's maximum weekly benefit, death benefits be at least 80 percent of the worker's spendable weekly earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in a State exceeds 100 percent of the State's average weekly wage.

On a transitional basis, a less desirable formula may be used.

[R3.21] We recommend that, subject to the State's maximum weekly benefit, death benefits be at least 66⅔ percent of the worker's gross weekly wage.

States may wish to pay a dependents' allowance in addition to the benefits based on gross weekly wages, but such an allowance would be inappropriate in addition to the benefits based on spendable earnings. For both types of benefits, protection against the value-eroding power of inflation is necessary.

[R3.22] We recommend that beneficiaries in death cases have their benefits increased through time in the same proportion as increases in the State's average weekly wage. REPORT OF THE NATIONAL COMMISSION at 71. (Emphasis added).

the National Commission that the economic impact on dependent survivors is no greater than the impact on families with a permanent totally disabled employee.[41]

[41]THE REPORT OF THE NATIONAL COMMISSION states in chapter one, entitled, "The General Objectives of Workmen's Compensation" states as follows:

> *While workmen's compensation benefits should be a substantial proportion of the worker's lost remuneration, there are reasons to set minimum and maximum weekly cash benefits.* A low-wage worker, if totally disabled, may be unable to live on the same proportion of lost remuneration that is appropriate for most workers. To avoid committing such a worker to dependence on welfare, a minimum weekly payment may be needed. Of course, if another program, such as a family income maintenance program, were to guarantee a basic level of income for all workers, there might be no need for minimum benefits under workmen's compensation.
>
> The arguments for maximum benefits are more troublesome. As long as benefits are linked to the losses in net remuneration caused by the work-related impairment, the task of providing incentives for return to work should be no more difficult for a worker with high earnings than for others. To argue that maximum benefits will reduce the costs of the program for employers is to ask disabled high-wage workers to bear a high proportion of their own lost remuneration. A somewhat more appealing argument for maximums is that highly paid workers presumably are able to provide their own insurance and to make decisions about risks. *A maximum limit on benefits would provide high-income workers an opportunity to design their own insurance programs: if, for example, the maximum benefits would replace only half of a high-wage worker's lost remuneration, he may choose to increase his private insurance.* Another possible argument for maximums is that if one conceives of workmen's compensation benefits being paid out of a fixed fund, then other uses for the fund, such as an extended duration for permanent total benefits, may have a greater priority than the replacement of a high proportion of lost remuneration for well paid workers. A final argument is that if workmen's compensation engages in some income distribution to the low-wage workers through the device of minimum benefits, then the same philosophy justifies income redistribution at the expense of high-wage workers. We are not totally unsympathetic to this philosophy, but we emphasize again that the primary purpose of workmen's compensation is to provide insurance against interruption of income, not welfare or income redistribution. *We conclude that there is an uneasy case for maximum and minimum benefits as long as they do not distort the primary insurance function of workmen's compensation.* (Emphasis added) REPORT OF THE NATIONAL COMMISSION at 37, 38.

THE SUPPLEMENTAL STUDIES for the National Commission (G.P.O. 1973) Volume 1 at 226 reinforces the arguments in favor of a maximum because of the availability of private insurance to highly paid employees. The Supplemental Studies state as follows:

> Survivor benefits are probably the most duplicated type of health benefit. Therefore, the likelihood of a family receiving income benefits from some other source is greater in the case of death than it is in other types of contingencies. One common source of funds derives from the receipts from a life insurance policy. At mid-year 1969, at least one member of 86 percent of American households owned some type of life insurance. Eighty-three percent of these families had coverage with legal reserve life insurance companies. The extent of ownership of policies varies according to the age of the head of the household, the region in which he lives and his income level. As might be expected, the middle and upper middle income groups are the most frequently insured, with 95 percent having life insurance. In families under the $5,000 income level, the percentage drops to about 70 percent. (Footnote omitted).

[42]Chamber of Commerce of the United States, ANALYSIS OF STAT. COMPENSATION LAWS (1975 ed.), states at 18 as follows:

> Although death is the ultimate work-related tragedy, the economic loss associated with death cases is often less than that of a permanent total disability. Because of these considerations, death benefits are generally paid to the spouse until remarriage and to the children until a specified age. In addition, some laws provide a maximum benefit total expressed as a maximum period for the payment of benefits.

Indeed there is compelling evidence that the economic effects of an industrial death are less devastating than the financial hardships forced upon the family of a permanently, totally disabled employee.[42]

II

READ AS A WHOLE AND WITH EFFECT GIVEN TO EACH PART THE ACT REQUIRES THE SAME MAXIMUM FOR DISABILITY AND FOR DEATH BENEFITS.

It is respectfully submitted that proper resolution of the question presented requires review of *all*

pertinent sections. The opinion below in emphasizing Section 9 only is fundamentally deficient in comparison to the scholarly and persuasive analysis of Sections 9, 6 and 10 by the Third and District of Columbia Circuit Courts of Appeals.

The critical language linking these Sections and imposing disability maximums upon death benefits appears in Subsection 6(d). Read by itself, Subsection 6(d) makes neither linguistic nor logical sense. It refers to "determinations under this subsection with respect to a period," but nowhere in the Act are the words "determinations" or "period" defined.

Only if this phrase refers to determinations of disability maximums under Subsections 6(d)(1), as found by the Third[43] and District of Columbia[44] Circuit Courts of Appeal, can the benefits scheme retain a harmonious and uniform meaning with all Sections consistent. If Subsection 6(d) refers, however, to the annual determination of the national average weekly wage in Subsection 6(d)(3), as found by the court below, then it affects only the minimum benefits and becomes nothing more than an unnecessary duplication of Subsection 10(f).[45] Surely Congress did not

[43] *O'Keefe*, 545 F. 2d at 344.

[44] *Boughman*, 545 F. 2d at 216.

[45] 86 Stat. 1258, 33 U.S.C. 910(f) (Supp. V) states as follows:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

intend an idle act by making Subsection 6(d) or 10(f) surplusage. The interpretation below thus removes all significance from one Section or the other.

The court below compounds its erroneous construction of Subsection 6(d) by suggesting that for the first time with the 1972 Amendments for disability and death benefits, "Congress deliberately chose to compute limitations in the two cases by entirely different methods."[46] Disability and death benefits have always, however, been computed by different methods.[47]

Prior to the 1972 Amendments the statutory formula for death benefits was always fixed at a percentage, not to exceed 66⅔% of the employee's average weekly wage. The average weekly wage in death cases was fixed at not more than a maximum dollar amount. For disability cases the compensation benefit itself, rather than the wage, was always a fixed dollar amount.

Merely because there are two different methods of mathematically calculating compensation, it does not follow that Congress intended to distinguish among the classes of beneficiaries by setting inconsistent maximums. The only persuasive evidence is that Congress set identical maximums.

This section makes the annual changes in the national average weekly wage equally applicable to all compensation benefits, including cases affected by the minimum. See footnote 19 of the opinion in *O'Keefe*, 545 F. 2d at 346, for the full explanation of the mathematical certainty of the effect achieved by Subsection 10(f), not Subsection 6(d).

[46] *Rasmussen*, 567 F. 2d at 1390, Solicitor General's Petition, App. A, at 12a.

[47] See, fns. 29, 30, *supra*.

The 1972 Amendments incorporated a sophisticated sliding scale of maximums, but through the operation of Subsection 6(d) did not disturb the imposition of the same maximum limit for disability and death. The Court below in finding an absolute maximum for disability but not death benefits favors one part of the Act without giving effect to the whole.

III

EXTRINSIC EVIDENCE OF THE LEGISLATIVE HISTORY OF THE 1972 AMENDMENTS INDICATES THAT CONGRESS DID NOT INTEND TO ABOLISH A MAXIMUM LIMIT FOR WEEKLY DEATH BENEFITS.

Given the disputed significance of Subsection 6(d), this Honorable Court may also resort to extrinsic aids in deciphering the correct Congressional intent. The aids available in this case include Senate Subcommittee hearings,[48] legislative history of the Amendments,[49] reports of both Houses[50] and floor debate.[51] Set forth in the margin[52] are statements from these

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[48]HEARINGS, fn. 32, *supra*.

[49]LEGISLATIVE HISTORY, fn. 36, *supra*.

[50]S. REP. No. 92-1125; H.R. REP. No. 92-1441, 92 Cong., 2d Sess. (1972).

[51]CONG. REC., VOL. 118: 30670, 30397, 36376, 30323, 36265, Extension of Remarks, for October 18, 1972, E. 8847.

[52]Ralph Hartman, Assistant Manager Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corporation stated in pertinent part as follows:

> We recognize the intent of the proposal [Senate Bill, S. 2318, 92 Cong.] and we suggest for your consideration that the maximum weekly benefit be predicated upon the average weekly wage in the shipbuilding and ship repair industry, that it be 66⅔ percent of the injured employee's average weekly wages computed under section 10, *subject to a maximum of 150 percent of the average weekly wage of the shipbuilding and ship repair industry*. HEARINGS at p. 171, 172. (Emphasis added)

sources in support of the employer's and carrier's position herein. The employer and carrier respectfully submit that the most persuasive evidence of Congressional intent appears in the Senate and House Reports summarizing the major provisions of the Bill which became the law.

The summaries with respect to disability and death benefits stated as follows:

> IMPROVEMENTS OF BENEFITS STRUCTURE:
>
> MAXIMUM AND MINIMUM BENEFITS AMOUNTS
>
> To the extent that employees receiving compensation for total permanent disability or *survivors receiving death benefits* receive less than the compensation they would receive if there were no phase-in, their compensation is to be *increased* as the ceiling moves to 200%.[53] (Emphasis added)

Edward Hood, President and Board Chairman of the Shipbuilders Council of America, supplemented Mr. Hartman's remarks as follows:

> I would like to say that Mr. Hartman's statements reflect a consensus of the membership of the shipbuilders' council. HEARINGS at p. 177.

On October 14, 1972, the day when the amendments with modifications were passed by both the House and Senate (118 CONG. REC. 36225, 36275; LEGISLATIVE HISTORY at p. 286), Congressman Daniels spoke in support of the amendments as follows:

> Mr. Speaker, I would like to go into the major provisions of the bill.
>
> A basic requirement of the act is for the injured worker to receive 66⅔ percent of his average weekly wage. As the result of the 12 year freeze, very few workers now actually receive this figure. The bill seeks to correct this deficiency. It provides *that the maximum compensation for disability shall not exceed a percentage of the national weekly wage to be determined by the Secretary of Labor*. LEGISLATIVE HISTORY at p. 286 (Emphasis added).

[53]S. REP. No. 92-1125 at 5.

On the day of passage of the Amendments, Senator Williams, a co-sponsor, read into the Congressional Record with approval the passage quoted above.[54]

A report subsequent to the passage[55] of the 1972 Amendments from the same Senate committee which produced the legislation states as follows:

> AMOUNTS OF BENEFITS
>
> Compensation for disability *and death* is based on the average weekly wage of the injured worker. *Maximum benefits may not exceed a specified percentage of the national average weekly wage.* The percentage increases from 125 prior to September 30, 1973, to 200 beginning October 1, 1975. The minimum 50 percent of the national average weekly wages or the employee's actual weekly wage, whichever is less.[56] (Emphasis added)

We submit that this clear expression of Congressional intent deserves the support of this Honorable Court.

---

[54] LEGISLATIVE HISTORY at 374; 118 CONG. REC. 36270.

[55] *Cf. Red Lyon Broadcasting Co. v. Federal Communications Comm'n,* 395 U.S. 367 (1968) (A report subsequent to the passage of the amendment does not deserve weight co-equal to statements made contemporaneously with passage).

[56] COMPILATION OF SELECTED LABOR LAWS, PERTAINING TO LABOR RELATIONS, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (G.P.O. 1974).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment and decision of the court below should be reversed.

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(Appendix Follows)

APPENDIX

Appendix

By this reference, petitioners incorporate as if set forth in full the appendices printed in the Petition for Writ of Certiorari, No. 77-1465, filed April 14, 1978, by the Solicitor General on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, requesting review of the same decision of the Ninth Circuit Court of Appeals.

Supreme Court, U. S.
FILED
SEP 8 1978
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Nos. 77-1465 and 77-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

GENEVIEVE O. RASMUSSEN and WILLIAM C. RASMUSSEN, JR.,

Respondents.

GEO CONTROL, INC. and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

vs.

GENEVIEVE O. RASMUSSEN and WILLIAM C. RASMUSSEN, JR.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1465 and 77-1491

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

GENEVIEVE O. RASMUSSEN
and WILLIAM C. RASMUSSEN, JR.,
Respondents.

GEO CONTROL, INC.
and NEW HAMPSHIRE INSURANCE COMPANY,
Petitioners,

vs.

GENEVIEVE O. RASMUSSEN
and WILLIAM C. RASMUSSEN, JR.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTION PRESENTED

What is the maximum death benefit payable to survivors of deceased workers under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972?

STATUTES INVOLVED

1. Immediately prior to its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 6(b), 44 Stat. 1426, as amended, 33 U.S.C. 906(b) (1970 ed.):

> Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That, if the employee's average weekly wages, as computed under section 10 of this title, are less than $18 per week he shall receive as compensation for total disability his average weekly wages.

Section 9, 44 Stat. 1429, as amended, 33 U.S.C. 909 (1970 ed.):

If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such

wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.* * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

* * * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in pertinent part:

Section 6(b), (d), 33 U.S.C. 906(b), (d) (Supp. V):

(b)(1) * * * [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

> (A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.
>
> (B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.
>
> (C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.
>
> (D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable

national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

* * * * *

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Section 9, 33 U.S.C. 909 (Supp. V):

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased,

during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

* * * * *

Section 10(f), 33 U.S.C. 910(f) Supp. V):

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arrising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

STATEMENT

On May 11, 1973 William C. Rasmussen was in the employ of Geo Control Incorporated, as a hydrologist under a public work contract between Geo Control and the United States in South Vietnam. Under the provisions of the Defense Base Act, 42 U.S.C. §1651 *et. seq.*, South Vietnam is in the 15th Compensation District; the employment was covered by the Defense Base Act and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et. seq.* (Supp. V).

Geo Control's liability for compensation under the Act was covered by insurance provided by the New Hampshire Insurance Co.

On May 11, 1973 Rasmussen, while performing services for Geo Control, received fatal injuries while traveling as a passenger in a jeep which triggered a land mine explosion, and his death arose out of and in the course of his employment. At the time, Mr. Rasmussen's average weekly wage was $798.00 per week.

As surviving widow Genevieve O. Rasmussen is entitled to death benefits in her own behalf beginning May 11, 1973 and continuing pursuant to the provisions of the Act.

William C. Rasmussen, Jr. born on October 17, 1955 was and is the surviving child of the employee and as of May 11, 1973 was and is entitled to death benefits to continue until his 18th birthday on October 17, 1973 and thereafter until his 23rd birthday on October 17, 1978 so long as he qualifies as a student as defined by the Act.

On October 18, 1973 Deputy Commissioner Donald C. Reichart entered a compensation order and awarded death benefits.

As of October 17, 1973 benefits payable to the son were terminated because he had reached the age of 18. At the

same time the widow's portion was determined by the carrier to be $125.25 per week plus a cost of living increase, required by Section 10(f) (6.49%). The total amount payable to the widow according to the carrier was $133.00 weekly, Appendix C, Federal Petitioner's Petition for a Writ of Certiorari herein, p. 33A.[1] Thereafter on December 5, 1973 by letter, Deputy Commissioner Reichart informed the carrier that compensation was to be paid in bi-weekly installments and that "information has been received you are compensating Mrs. Rasmussen at a rate of $133.00 per week rather than the $167.00 as awarded. Please correct this and advise." *Id.*

Despite the direction of the Deputy Commissioner as of April 2, 1974 the carrier was making weekly payments in the total amount of $133.00 to the widow. *Id.* Thereafter, the dispute was referred to an administrative law judge for hearing.

On October 24, 1974 Administrative Law Judge William B. Devaney, U.S. Department of Labor, issued a Decision and Order. Judge Devaney's 39 page opinion exhuastively reviewed the legislative history immediately preceding the 1972 amendments to the Act. At page 31 of his Decision and Order, Fed. Pet. at p. 63A, Judge Devaney concluded that, "Congress in amending Section 9(e) of the Act intentionally and with full awareness of the limitation provided in Section 6(b)(1) of the Act as to disability compensation, removed the arbitrary limitation previously applied to compensation for death and instead provided that death benefits should be a percentage of the average weekly wages of the deceased provided only that the total weekly benefit shall not exceed 66 & 2/3% of the average weekly wages of the deceased." Therefore, Judge Devaney ordered that the widow was entitled to a death benefit of 50% of the employee's average weekly wage of $798.00 from May 11, 1973 and the son was entitled to a death benefit of 16 &

[1] Hereinafter this Petition will be referred to as "Fed.Pet."

2/3% of the employee's average weekly wages of $798.00 from the same date, for a total weekly benefit of $532.00.

Petitioners Geo Control, Inc. and New Hampshire Insurance Company filed a Notice of Appeal with the Benefits Review Board, U.S. Department of Labor on or about November 22, 1974. On April 3, 1975 the Benefits Review Board, Washington, Chairperson, Hartman and Miller, members, issued a Decision. Appendix B, Fed. Pet. The Board concluded "that the Administrative Law Judge correctly determined that the maximum limit on disability compensation according to the provisions of 6(b)(1) of the Act does not apply to death benefits awarded under Section 9(b), [33 U.S.C., Secs. 906(b)(1), 909(b)]." *Id.* pp. 19A, 20A.

The Court of Appeals for the Ninth Circuit affirmed the Board's decision. *Director, Office of Workers' Comp. et al v. Rasmussen*, 567 F.2d 1385 (1978). The Court concluded "that Petitioners have failed to meet their burden of establishing that Congress did not knowingly and intentionally eliminate the maximum limitation on death benefits" from the Longshoremen's and Harbor Workers' Compensation Act. Appendix A, Fed. Pet. p. 14A.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals held that Congress in its 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "the Act") knowingly and intentionally removed any arbitrary ceiling on death benefits, and consciously chose to treat such recipients in a manner different from those receiving disability benefits.

This ruling is fully supported by the legislative history. From the beginning of the Congressional hearings on these amendments the elimination of maximums from disability and death benefits was proposed. The bill representing this viewpoint removed such maximums by eliminating all reference to maximums from the statute. During the

hearings, this proposal received a substantial amount of attention from witnesses, some of whom favored the proposal and others of whom opposed it.

The Report of the National Commission on State Workmen's Compensation Laws, which is mentioned in the legislative history, recognized that there are valid reasons for treating death benefit recipients in a different, more favorable way than disability benefit recipients, and this point was noted by the Ninth Circuit. Further, the National Commission recommendations of death benefit maximums are minimum recommendations only.

Section 6(d) of the Act does not contain a death benefit maximum. To read such a maximum into Section 6(d) is to write words into the section that are not there. Such activity is a legislative function to be avoided by the judiciary. The purpose of Section 6(d) is to explain that only permanent total disability and death benefit recipients are to receive the benefit of a national average weekly wage that increases from period to period.

The Ninth Circuit decision is fully supported by the rules of statutory construction and case law. The Act is beneficent in nature and humanitarian of purpose, and is to be liberally construed with such purpose in mind. Further, doubts concerning such statute are to be construed in favor of the injured employee and his family.

The Ninth Circuit notes that the 1972 amendments to the Act have the further effect of favoring death benefits over disability benefits in some situations involving minimum benefit levels. Such a result is further evidence of Congressional intent to treat the two classes of benefits differently.

Finally, it would have been very simple for Congress to have clearly and unequivocally made the Section 6(b)(1) maximums applicable to death benefit cases. The Congress did not because that was not its intention.

ARGUMENT

I. LEGISLATIVE HISTORY ESTABLISHES THAT THE CONGRESS INTENDED TO REMOVE DEATH BENEFIT DOLLAR MAXIMUMS FROM THE ACT

A. Congressional Hearings and Proposed Amendments

On May 2, 1972 the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare convened to consider amendments to the Act. Senators Thomas F. Eagleton, Chairman, and Jacob Javits were present. In his opening remarks, Senator Eagleton said, in part,:[2]

* * * * *

> The bills pending before us will improve the benefits. S. 2318 which I co-sponsored with Senator Williams *would eliminate the maximum payment limitations.* It would also provide for the Secretary of Labor to make an annual calculation of the increase in wages so as to upgrade the benefits for those already on disabillty from year to year.
>
> The second bill, S. 525, introduced by the late Senator Prouty at the request of the Administration would also increase the benefits *although retaining a maximum limitation.*

* * * * * *

S. 2318 set out the new maximum and minimum limits as follows:

---

[2]Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearings before the Subcommittee on Labor and Public Welfare, United States Senate, Ninety-Second Congress, Second Session on S.2318, S.525 and S.1547, at p. 2. (Emphasis supplied). Hereinafter this volume will be cited as *Hearings*.

MAXIMUM AND MINIMUM LIMITS OF
DISABILITY COMPENSATION AND ALLOWANCE

SEC. 4(a) Section 6(b) of such Act is amended to read as follows:

(a) Compensation for total disability shall not be less than $54.00 per week: *Provided,* however, that, if the employee's average weekly wages as computed under Section 10 are less than $54.00 per week, he shall receive as compensation for a total disability his average weekly wages.

* * * * *

DEATH BENEFITS

* * * * *

SEC. 10(b) Section 9(e) of such Act is amended to read as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than $80 but the total weekly compensation shall not exceed the weekly wages of the deceased.

Hearings, pp. 6, 9 and 10. From the beginning, the proffered amendments of S. 2318 to remove maximums from the disability and death benefit sections were expressed in language that eliminated all reference to a maximum and retained language only specifying the minimum benefit levels. As the following recitation shows, there was no confusion among the witnesses appearing before the Subcommittee as to the effect of those proposed amendments.

The first witness to appear before the Subcommittee was the Secretary of Labor, James Hodgson. Concerning S. 2318, he stated:

> [it] would eliminate any ceilings on compensation rates; that is, there would be no

> maximum on weekly compensation and no maximum on overall compensation payable. I don't really think it is advisable to eliminate ceilings on compensation rates.

Hearings, p. 31. Senator Eagleton pointed out that the ceilings proposed in S. 525 "almost become out of date the minute the law is passed." *Hearings*, p. 34.

Following the appearance of Secretary Hodgson, a voluminous amount of testimony was received concerning the advisability of retaining a maximum limit on death cases or to dispense with it as proposed in S. 2318. For example, the AFL-CIO supported the elimination of maximum limits in both death and disability cases as proposed by S. 2318 and stated that, ". . . it is, in our opinion, the only humane and decent manner that should be used to compute death benefits." *Hearings*, p. 87. Further, Thomas W. Gleason, President of the International Longshoremen's Association supported S. 2318 by submitting a written statement, which provided in part:

> . . . that bill would eliminate the artificial and totally unrealistic restrictions on benefit amounts. This would enable compensation awards for the first time to reflect realistically the loss of earnings suffered by injured employees. The bill would also provide for an updating of old awards to keep pace with the increase in prevailing industrial wage levels. . .

Hearings, p. 157. In addition, the setting of a maximum limit in death cases was opposed by David B. Kaplan, Chairman of the Admiralty Section, American Trial Lawyers Association, who noted that such limitations penalize the most diligent and ardent workers who are the highest paid. *Hearings*, p. 381. Moreover, the Honorable Phillip Burton, Member of Congress, 5th District of

California, appeared before the Subcommittee and testified:

> I would hope that we would favorably consider eliminating the ceiling. The ceiling is at best arbitrary and a disabled-connected benefit should be geared, I think, to the wages without regard to an arbitrary ceiling. In the event the Committee decides that there should be some ceiling, then I would submit that the Federal Employees Compensation Act — which I had some small part in construction — should be the measurement whereby the limitation on the total benefit should be drawn.

Hearings, p. 618. Frank Bonadio, President, Building and Construction Trades Department, AFL-CIO, in his statement to the Subcommittee contended that maximum limitations in benefits quickly become inadequate due to inflation. *Hearings*, p. 681. Mr. Bonadio added:

> In fact thousands of employees covered under this Act earn over $25,000.00 per year . . . In these instances present maximum benefits of $70.00 per week would amount to only about 15% of the worker's income.

Hearings, p. 681. Howard McGuran, Legislative Representative, AFL-CIO, with respect to "Maximum and Minimum Limits of Disability Compensation and Allowance", stated, in part, as follows:

> Mr. Chairman, the AFL-CIO is opposed to the weekly benefit amount proposals in S.525 because they fail to meet the fundamental goal of workmen's compensation. . . .
>
> * * * * *

> Section 8(a), (b), and (c) of the Longshoremen's Act specifies that the weekly wages replacement shall be 66 2/3 percent of the injured worker's average weekly wage, and the AFL-CIO would like to see this goal achieved.

Hearings, p. 63. With respect to "Death Benefits", Mr. McGurgan stated, in part, as follows:

> In addition, the weekly wage used to compute death benefits in other cases, would be the weekly wage of the unfortunate victims. The AFL-CIO supports this approach to the computation of death benefits. We sincerely hope the committee will adopt the proposal contained in S.2318.

Hearings, p. 65. Patrick Tobin, Washington Representative, International Longshoremen's and Warehousemen's Union, made the following comment:

> We join with the International Longshoremen's Association AFL-CIO, the District of Columbia AFL-CIO representatives, and other unions in supporting S.2318 and opposing S.525.

Hearings, p. 133. Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, in a letter to Senator Williams stated, in part:

> I would appreciate the inclusion in your records of this letter of support by the Teamsters Union for S.2318 (Longshoremen and Harbor Workers Compensation Act Amendments 1971). Similarly, we state our opposition to parallel measures S.525 (Longshoremen and Harbor Workers Compensation Act Amendments 1971) and S.1547.
>
> * * * * *

> Similarly, we must oppose S.525, for some notably regressive provisions, in what is an otherwise fair attempt at improving the work-injury protection program.
>
> * * * * *
>
> . . . Only S. 2318, we feel, approximates the much needed and progressive improvements in compensation programs already in effect in other industries.
>
> * * * * *

Hearings, pp. 700, 701. As might be expected, elimination of the ceilings was opposed by industry representatives. Ralph Hartman of the Bethlehem Steel Corporation and Edward Hood of the Shipbuilders Council of America proposed retaining a limitations provisions in both disability and death cases but at somewhat higher levels than those proposed by the Administration. *Hearings*, pp. 169-227, in particular pp. 171, 175, 182, 218. Mr. Hartman stated, in part, as follows:

> . . . The industry has an obligation to its employees, and we are aware of the fact that they are exposed to hazards and hazardous employment, and we are interested that they receive an equitable and fair loss of earnings replacement. The wage loss replacement concept is the basic underlying objective of workmen's compensation.
>
> It is on this premise that we endorse the basic concepts of S.2318, and proposed innovations or variations which we consider urgent and demanding, yet equitable to all concerned.
>
> * * * * *
>
> Of major impact and importance to the industry are the proposals to increase weekly benefits. One such proposal would amend section

6(b) of the Act by increasing the minimum weekly rate from $18 to $54 and eliminating the present maximum weekly benefit rate of $70.

We agree that the minimum rate should be increased. *However, this proposal leaves us with a weekly benefit rate of two-thirds of the employee's average weekly earnings without limitation.*

* * * * *

Hearings, pp. 170, 171. (Emphasis supplied). Mr. Hood was in agreement:

I would like to say that Mr. Hartman's statements reflect a consensus of the membership of the Shipbuilder's Council.

Hearings, pp. 203-204. Edward D. Vickery submitted a statement on behalf of the National Maritime Compensation Committee in which he stated, in part, as follows:

Section 4 of S.525
and
Section 4 of S.2318

Increases in Maximum and
Minimum Limits of Compensation

S.525 would amend Section 6(b) to increase the maximum weekly compensation rate of $70 per week to $119 and the minimum rate from $18 to $35; and would amend Section 14(m) to increase the statutory maximum portionately (sic) from $24,000 to $40,800 for all cases other than the total permanent disability or death. S.2318 would amend Section 6(b) by removing all maximum limits on the weekly compensation rate and would increase the minimum to $54 per week; and would repeal Section 14(m) in order to remove all

monetary limits on compensation payments in all cases.

COMMENT: If the circular liability claims are eliminated, the National Maritime Compensation Committee recognizes that an increase in the maximum weekly compensation benefits is indicated, with a corresponding increase in the statutory maximum. The basic question presented by the provisions of the two bills is whether a maximum limit should be maintained on weekly compensation benefits and on all cases other than total permanent disability and death. The National Maritime Compensation Committee respectfully submits that it is of primary importance that the monetary maximum both on weekly benefit and in all cases other than those involving total permanent disability and death be maintained. . . .

* * * * *

Section 8 of S.525
and
Section 10 of S.2318

INCREASE IN DEATH BENEFITS

S.525 would increase death benefits payable to a widow from 35% to 45% and increasing compensation for the first child from 35% to 45% if there is no surviving wife. S.525 retains the weekly maximum monetary limitations on death benefits whereas S.2318 removes all limitations on the weekly maximum monetary benefits and increases the allowance for funeral expenses from $400 to $800.

COMMENT: For the reasons previously discussed in some detail in connection with Sec-

> tion 4 of both S.525 and S.2318, we respectfully submit that it is not advisable to remove the monetary maximum benefits payable per week under the Longshoremen's Act and therefore recommend that the provisions of Section 8 of S.525 be retained in this regard. . . .

Hearings, pp. 318, 334. The hearings concluded on June 5, 1972. On September 13, 1972 Senator Eagleton reported a substantially revised version of S.2318,[3] including the following language from Section 9(e):

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Legislative History, p. 43. This is the language that was subsequently enacted into law. It should be noted that this revised section was formulated following the extensive hearings concerning the advisability of removing maximums on death benefits. Since it was Senator Eagleton who chaired the hearings and who revised the wording of Section 9(e) it must be presumed that the elimination of a maximum dollar limitation in death benefits was purposely and consciously eliminated from the revised S.2318.

Accompanying the revised S.2318 was Senate Report No. 92-1125. *Legislative History*, p. 63. In compliance with Subsection 4, Rule XXIX of the Rules of the Senate, published with the Senate Report were the changes in the existing law

[3]Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S.2318, Public Law 92-576) prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, December 1972, pp. 15-61. This volume will hereinafter be cited as *Legislative History*.

made by the bill which were shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is underscored, existing law in which no change is proposed is shown in Roman):

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor] less than [$27] *the applicable national average weekly wage as prescribed in Section 6(b)* but the total weekly [compensation] *benefits* shall not exceed the *average* weekly wages of the deceased.

Legislative History, p. 102. The above presentation indicates clearly that the dollar maximum and minimum limitations were removed and only a dollar minimum tied to the national average weekly wage was inserted. Limitations for death benefits were deleted.

S. Rep. 92-1125 discussed the Major Provisions of the Bill and begins with "Improvement of the Benefit Structure" at page 5. *Legislative History*, p. 67. The first item discussed thereunder was *Maximum and minimum benefit amounts*, and the Report stated, in part, as follows:

> The basic requirement of the Act is for the injured worker to receive 66 2/3% of his average weekly wage. Historically this 2/3 requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. . . .
>
> Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor . . .

The next item discussed under "Improvement of the Benefit Structure", was, *Survivor Benefits*, and the Report stated, in part, as follows:

The benefit structure for survivors is altered to provide additional benefits for widows and children. . . Section 9 of the Act (Section 10 of the bill) is amended to increase funeral benefits from the present 400 dollars to a more realistic amount of 1,000 dollars. The present Act provides that a surviving wife or husband receives 35 percent of the award, and children receive 15 percent. The amended Act will provide a 50 percent award to surviving wives or husbands and 16 2/3 percent to the children, subject to a maximum of 66 2/3 percent of the average weekly wages.

* * * * *

A minimum death benefit tied to the applicable national weekly wage but not to exceed the employee's average weekly wage is also provided.

Legislative History, p. 68. S. Rep. 92-1125, also set forth a Section by Section Analysis of S.2318 and provided, in part, as follows:

> *Section 10(d)* amends section 9(e) to provide that in computing death benefits the employee's average weekly wage shall be considered as not less than the national average weekly wage. *However, maximum weekly death benefits could not be more than the employee's average weekly wages.*

Legislative History, p. 84. (Emphasis supplied). S.2318 was passed by the Senate September 14, 1972. *Legislative History*, p. 139.

In the House of Representatives, Congressman Daniels of New Jersey on September 25, 1972 introduced H.R. 12006, a bill identical to the revised S.2318.

The House Report, in compliance with Rule XIII of the Rules of the House of Representatives, showed the change in §9(e) as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased] *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*

Legislative History, p. 243. The House Report accompanying H.R. 12006 also stated in part as follows:

Section 10

This section amends section 9 (pertaining to compensation for death) of the Act.

* * * * *

Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under the present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the act, except that *the total weekly benefits may not exceed the actual average weekly wages of the deceased.*

Legislative History, p. 225. (Emphasis supplied). Congressman Daniels spoke in support of the bill on October 14, 1972, and stated, in part, as follows:

> Mr. Speaker, I would like to go into the major provisions of the bill.
>
> A basic requirement of the act is for the injured worker to receive 66 2/3 percent of his average weekly wage. As the result of the 12 year freeze,

very few workers now actually receive this figure. The bill seeks to correct this deficiency. It provides *that the maximum compensation for disability shall not exceed a percentage of the national weekly wage* to be determined by the Secretary of Labor.

* * * * *

It provides increased benefits to widows and dependent children.

* * * * *

It provides increased benefits to survivors of workmen killed as a result of job injuries.

* * * * *

Legislative History, p. 286. (Emphasis supplied). Congressman Steiger, on October 14, 1973, stated, in part, as follows:

Mr. Speaker, I rise in support of this much-needed improvement in the Longshore Compensation Act.

Because the time is so short my extension will include a series of questions and answers which discuss the most substantive issues included in this bill.

* * * * *

The questions and answers follow:
(Legislative History, pp. 297-298)

* * * * *

Question. Do the amendments change the death benefits?

Answer. Under present law, the maximum allowed for funeral expenses is $400. The bill raises this maximum to $1000. Also, a surviving

wife or dependent husband is now entitled to compensatory payments equaling 35 percent of the deceased's average wage, and 15 percent of the deceased's average wage for each dependent child. The percentage for the surviving spouse is raised by the bill to 50 percent and the percentage for each dependent child is raised to 16 2/3 percent. The Act's present total compensation maximum of 66 2/3 percent of the deceased's average wage is retained . . .

Legislative History, p. 301. Prior to final action in the Senate, Senator Williams, a cosponsor of S.2318 made in part, the following remarks:

* * * * *

. . . This legislation represents the *first serious step toward reform of our society's workmen's compensation laws in the past 50 years.*

* * * * *

. . . Last Year there were more than 109,000 injuries in this statute; 240 workers covered by the act were killed . . . . *(Legislative History*, p. 371).

* * * * *

The National Commission on Workmen's Compensation laws which we created in passing the Occupational Health and Safety Act of 1970 has submitted a comprehensive report and recommendation of the need to upgrade workmen's compensation standards nationwide including if necessary the imposition of Federal standards.

In the limited but significant area covered by the Longshoremen Act we have attempted to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission.

I shall in the near future be giving careful consideration to a measure which will implement or improve upon the National Commission's recommendations and I certainly expect to use the improvements in this bill as a model. *(Legislative History*, p. 372).

* * * * *

The bill amends the act to provide that the maximum compensation for disability shall not exceed 200 percent of the national average weekly wage . . . (*Legislative History*, p. 374).

* * * * *

The benefit structure for survivors is altered to provide additional benefits for widows and children . . . The amended Act will provide a 50 percent award to surviving wives or husbands and 16 2/3 percent to the children, subject to a maximum of 66 2/3 percent of the average weekly wages. . . . *(Legislative History*, p. 375).

The foregoing analysis of the hearings concerning the 1972 amendments of the Act establishes unquestionably that the Congress, from the opening days of the hearings, considered the advisability of eliminating maximums as to death and disability, and received voluminous testimony on that proposal. From the beginning, the proposed amendments to the Act, by S.2318, expressed only a minimum benefit and did not express a maximum. The latter was merely excised in the bill's language. Although Section 6 was substantially rewritten in the revised S.2318 to include a maximum benefit for disability, tied to the national average weekly wage, Section 9(e) was not so revised. As finally passed by the Senate and House of Representatives, Section 9(e) read as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Legislative History, p. 555. Section 9(e) as proposed by the original S.2318 stated:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than $80 but the total weekly compensation shall not exceed the weekly wages of the deceased.

Hearings, p. 10. A comparison of the language above indicates a striking similarity. The method of expressing the minimum and the method of removing the maximum is identical. Yet, Section 9 *was* amended, so that the minimum benefits would be tied to the national average weekly wage, a term that was added to the revised S.2318.

It is clear, then, that when redrafting S.2318, the death benefit section was reviewed and changed. The redrafters, however, made no mention of any maximum death benefit in Section 9(e). It is respondents' submission that the omission of any reference to death benefit maximums in Section 9, where such maximums had traditionally and exclusively appeared since the inception of the Act, was a conscious and deliberate action by the Congress, expressing its desire to remove any arbitrary ceiling on this class of benefits.

B. Report of the National Commission on State Workmen's Compensation Laws

In the Senate Report under the heading "Maximum and Minimum Benefit Amounts" the Report states in part as follows:

> Section 5 of the Bill amends the Act to provide that the maximum compensation *for disability* shall not exceed 200 percent of the national average weekly wage to be determined annually by the Secretary of Labor . . . These maximums meet the recommended standards of the National Commission on State Workmen's Compensation Laws.

Legislative History, p. 67. (Emphasis supplied). Taken in context then, this reference to the Report of the National Commission is mentioned only with respect to maximums for disability. As Judge Devaney noted in his opinion: "The reference is not repeated in the following section entitled 'Survivor Benefits'. Fed.Pet, p. 59A.

Nevertheless, a review of the Report's discussions of maximum and minimum limitations is instructive. At 37,38, the Report discusses, under the heading "Disability Benefits," maximum and minimum limitations, in part, as follows:

* * * * *

> While workmen's compensation benefits should be a substantial proportion of the worker's lost remuneration, there are reasons to set minimum and maximum weekly cash benefits. A low-wage worker, if totally disabled, may be unable to live on the same proportion of lost remuneration that is appropriate for most workers. To avoid committing such a worker to dependence on welfare, a

> minimum weekly payment may be needed. Of course, if another program, such as a family income maintenance program, were to guarantee a basic level of income for all workers, there might be no need for minimum benefits under workmen's compensation.
>
> *The arguments for maximum benefit are more troublesome.* As long as benefits are linked to the losses in net remuneration caused by the work-related impairment, the task of providing incentives for return to work should be no more difficult for a worker with high earnings than for others. To argue that maximum benefits will reduce the costs of the program for employers is to ask disabled high-wage workers to bear a high proportion of their own lost remuneration. A somewhat more appealing argument for maximums is that highly paid workers presumably are able to provide their own insurance and to make decisions about risks. A maximum limit on benefits would provide high-income workers an opportunity to design their own insurance programs: if, for example, the maximum benefits would replace only half of a high-wage worker's lost remuneration, he may choose to increase his private insurance. Another *possible argument* for maximums is *that if one conceives of workmen's compensation benefits being paid out of a fixed fund*, then other uses for the fund, such as an extended duration for permanent total benefits, may have a greater priority than the replacement of a high proportion of lost remuneration for well paid workers. A final argument is that if workmen's compensation engages in some income distribution to the low-age workers through the device of minimum benefits, then the same philosophy justifies in-

come redistribution at the expense of high-wage workers. We are not totally unsympathetic to this philosophy, but we emphasize again that the primary purpose of workmen's compensation is to provide insurance against interruption of income, not welfare or income redistribution. *We conclude that there is an uneasy case for maximum and minimum benefits* as long as they do not distort the primary insurance function of workmen's compensation. (Emphasis supplied).

* * * * *

The Commission, then, found at best an "uneasy case" for minimum and maximum benefit levels, and that of the two, maximums were "more troublesome."

At pages 71, 72, the Report discusses death benefits, in part, as follows: (Emphasis supplied).

* * * * *

E. DEATH BENEFITS

Work-related deaths account for less than one percent of all workmen's compensation claims and less that 10 percent of all benefits. *As the ultimate tragedy, work-related death deserves full compensation.* The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program.

The Porportion of Lost Remuneration to be Replaced

* * * * *

Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities,

the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivation problems, which suggests that replacement of more than the normal 66-2/3 percent of lost wages is appropriate. The considerations that suggest the proportion of lost wages to be replaced in death cases should be greater than, or less than, the proportion in total disability cases seem to be roughly in balance.

* * * * *

Maxiumum Weekly Benefit

The Model Act provides that the maximum weekly benefit in death cases shall be equal to two-thirds of the State's average weekly wage. We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases, and therefore:

R3.23

We recommend that as of July 1, 1973, the *maximum* weekly death benefit be *at least* 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be *at least* 100 percent of the State's average weekly wage.

R.3.24

We recommend that as of July 1, 1977, the *maximum* weekly death benefit be *at least* 133-1/3 percent of the State's average weekly wage; as

of July 1, 1979, the maximum should be *at least* 166-2/3 percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be *at least* 200 percent of the State's average weekly wage.

* * * * *

A number of comments must be made concerning the Commission's discussion of death benefits. First, in the opening paragraph, the Commission states that death "the ultimate tragedy . . . deserves full compensation." Then, in the discussion of the proportion of lost remuneration to be replaced, the Commission suggests that the percentage be greater than in the case of disability payments. Finally, the maximums recommended by the Commission for death benefits were *minimum* recommendations. Each percentage of the State's average weekly wage that is proposed as the maximum benefit is preceded by the phrase "at least." Thus, at p. 71 of the Report, the Commission recommends that "as of July 1, 1979, the maximum (death benefit) should be *at least* 166-2/3 percent of the State's average weekly wage." Devaney recognized and cited this fact in his decision and order. Fed. Pet. at p. 60A.

The commission's discussion of death benefits, then, establishes that the Commission contemplated benefit levels in death cases that would be greater than disability benefit levels, and in fact felt that desirable.

C. Section 6(d)

It has been suggested that Section 6(d) affects the level of death benefits. Section 6(d) contains no language specifying a death benefit maximum. No death benefit maximum is set out any where in the Act, as amended in 1972, except for the provisions of Section 9(b) which state that the maximum percentage of average weekly wages payable as death benefits be 66-2/3's thereof.

A reference to the legislative history is not necessary where the language of the statute is clear on its face. *United States v. Oregon*, 366 U.S. 643, 81 S. Ct. 1278 (1961). However, because death benefits are mentioned in Section 6(d) and because the text is somewhat obscure, the prior tribunals in this case have examined the legislative history and the language of the amended Act to discern the meaning of this section.

Section 6(d) is designed to specify that only permanent total disability and death benefit recipients are to receive enhanced benefits period to period if the national average weekly wage increases. The other classes of disability recipients do not receive such enhancements.

As an example, a high income, temporary total disability recipient has his benefits limited by the Section 6(b)(1) maximum of 200 percent of the national average weekly wage. The exact amount will depend on which period he is awarded such benefits. If this recipient's disability continues into the *next* period, though, are his benefits increased, presuming an increase in the national average weekly wage?

Section 6(b)(1) states that the compensation for disability "shall not exceed the following percentages of the applicable National Average Weekly Wage as determined by the Secretary under paragraph (3): . . . (D) 200 percentum beginning October 1, 1975." Section 6(b)(3) referred to directly above specifies the method by which the Secretary of Labor determines the national average weekly wage, and that such wage is redetermined each year.

Section 6(b) then is inconclusive on this question. It could be read either way: that maximum disability payments are to be increased period to period pursuant to an increasing national average weekly wage, or that the disability recipients are frozen at the level of compensation when awarded.

Section 10(f) does not answer this query either. Section 10(f) provides that permanent total disability and death benefit recipients are to receive enhanced benefits period to period based upon an increasing national average weekly wage. Other classes of disability are not mentioned, but this is not conclusive, for Section 10(f) is designed to provide that *all* recipients of permanent total disability and death benefits shall receive such enhancements. For if it is presumed that there is no Section 10(f) and the new national average weekly wage is substituted each period to figure benefits, then only some minimum death benefit recipients and some minimum and all maximum recipients for disability would get such increases. Those recipients whose benefits are figured pursuant to the employee's average weekly wage would not get such increases. Section 10(f) then "fills the gap" with respect to permanent total disability and death benefits, providing that the entire range of such beneficiaries receive benefit enhancements based on the national average weekly wage.

The answer concerning the temporary total disabled worker then is not answered by either Section 6(b) or Section 10(f). The only other section that concerns this query is Section 6(d):

> (d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

As has been noted elsewhere, "determinations" are not defined in the Act. However, in the only bit of legislative history that clearly discussed Section 6(d), it is stated that such determinations are of national average weekly wage.[4]

[4]S.Rep. 92-1125, *Legislative History* p. 80. Specifically, in the Section by Section Analysis of revised S.2318 the Senate Report said of Section 6(d): "Subsection (d) states that determinations of *National Average Weekly Wage* made with respect to a period apply to employees or survivors currently receiving compensation for permanent total disability or death benefits, *as well as those who begin receiving compensation for the first time during the period.*" (Emphasis supplied). See also Devaney, Fed.Pet. at p. 58A.

Section 6(d) provides that the determinations of national average weekly wage are to apply to those "currently receiving" benefits as well as those "newly awarded" benefits during the period. The determinations, it should be noted, are with respect to "a period," not "the phase-in period" or "a specific period."

Section 6(d)'s purpose, then, is discerned. The Congress wished to treat permanent total disability and death benefit recipients specially, and did so by virtue of Section 10(f). Recognizing, though, that a question remained as to other classes of disability receipients. Congress inserted Section 6(d) to explain that those classes of beneficiaries are in effect frozen at the levels of benefits they are awarded.

It is thus clear that Section 6(d) has nothing whatsoever to do with setting a death benefit maximum.

II. CASE LAW AND THE RULES OF STATUTORY CONSTRUCTION SUPPORT THE FINDING OF NO DEATH BENEFIT MAXIMUMS IN THE ACT, AS AMENDED

The 1972 amendments to the Act were remedial in nature, designed to remove inequities that existed in the Act. One of the main purposes was to greatly enhance benefits to workers. *Hearings*, p. 2. As such, the amendments, as with the statute from its origins in 1927, were beneficent in nature and humanitarian of purpose. This Court has long recognized the beneficent nature of the Act, and has ruled that the Act should be liberally construed in light of such purpose. *Northeast Marine Terminal Company, Inc. et al v. Caputo*, 97 S.Ct. 2348 (1977); *Reed v.*

Steamship Yaka, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963), *rehearing denied*, 375 U.S. 872, 84 S.Ct. 27, 11 L.Ed.2d 101 (1963); *Voris v. Eikel*, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953); *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 72 S.Ct. 223, 96 L.Ed. 225 (1951); see also, *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969); *Calbeck v. A.D. Suderman Stevedoring Co.*, 290 F.2d 308 (5th Cir. 1961); *Old Dominion Stevedoring Corp. v. O'Hearne*, 218 F.2d 651 (4th Cir. 1955); *Blackwell Construction Co. v. Garrell*, 352 F.Supp. 192 (D.D.C. 1972); *Page Communications Engineers, Inc. v. Arrien*,315 F.Supp. 569 (E.D.Pa.1970); *Holland America Insurance Co. v. Rogers*, 313 F.Supp. 314 (N.D.Cal.1970); *Gibson v. Hughes*, 192 F.Supp. 564 (S.D.N.Y.1961).

Further, doubts are to be construed in favor of the employee and his family. *Friend v. Britton*, 95 U.S.App.D.C.139, 220 F.2d 820 (1955), *cert. denied*, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 745 (1955); *Hartford Accident & Indemnity Co. v. Cardillo*, 72 App.D.C. 52, 112 F.2d 11 (1940), *cert. denied*, 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415 (1940); *Grain Handling Co. v. McManigal*, 23 F.Supp. 748 (W.D.N.Y.1938); *aff'd* 102 F.2d 464 (2 Cir.), *cert. denied*, 308 U.S. 570, 60 S.Ct. 83, 84 L.Ed. 478 (1939).

The rules of statutory construction are in accord.[6]

Although the Act is to be liberally construed in favor of the workers and their families, the function of statutory interpretation by the judiciary is not to be exceeded. The power to make, alter or repeal statutes is legislative. *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 81 S.Ct. 557 (1960); *Northern Securities Co. v. United States*,

[6]Sutherland, *Statutory Construction*, by Sands, 4th Ed., 1972 at Sec. 58.04 states that statutes which are enacted to relieve personal disadvantages, hardship and suffering are generally accorded generous judicial acceptance and liberal construction. "Illustrative are laws granting rights to laborers, debtors, and the poor."

193 U.S. 197, 24 S.Ct. 436 (1903)). As such, the courts do not encroach upon a coordinate branch of government by enlarging or altering legislative enactments. *Ebert v. Poston*, 266 U.S. 548, 45 S.Ct. 188 (1924). Adding words or interpolating words that the legislature has omitted are examples of the type of alteration of statutes that the courts will avoid. *Id.*, *Pirie v. Chicago Title and T. Co.*, 182 U.S. 438, 21 S.Ct. 906 (1900). Even where the result might be considered ill-advised, this court will not reverse a clear statutory expression of Congressional intent. *Tennessee Valley Authority v. Hill*, U.S.S.C. No. 76-1701, 46 Law Week 4673 (Decided June 15, 1978).

To read a death benefit maximum into the Act as amended this Court must insert such language, for it simply does not exist, either in Section 9 or Section 6. As stated earlier, Section 6(d), while admittedly containing the words "death benefits," does not contain any language indicating a death benefit maximum. It is respondents' submission that such insertion would be beyond the bounds of judicial interpretation of statute, and would be creation of statute.

It is unquestionably more beneficent for a statute such as the Act to provide death benefits to the survivors of workers that are killed during the course of their employment in amounts that are unfettered of arbitrary ceilings.

One of the primary reasons for workers' compensation statutes replacing less than the full wage is that such practice offers an incentive to the injured worker to return to productivity.[7] The case is of course entirely different if the

[7]Report of the National Commission, p. 71. Such principle holds true for all classes of disability. If, for example, an injury causes the loss of a hand and an eye, or a hand and a foot, or both feet, the Act provides that such injuries, absent conclusive proof to the contrary, are considered permanent and total. Section 8(a) 33 U.S.C. §908(a). Such injuries are terrible tragedies, but it is conceivable that workers so injured could return to productive, useful lives. It should also be noted that such injuries, after a healing and convalescent period, would not require continued care.

worker dies. In such case the incentive reasoning has no application; the argument for maximums and other limitations on benefits becomes more difficult to sustain. Hence, removing the ceilings on death benefit maximums has a rationale, and is consistent with the humanitarian concepts of the Act.

III. DECISION OF THE NINTH CIRCUIT

The decision of the United States Court of Appeals for the Ninth Circuit[8] represents the most careful review of the entire legislative history of the 1972 amendments to the Act by any circuit court of appeals. That court rightly concluded that when viewing the legislative history as a whole, the intent of Congress is surmised, and that intent was to remove maximums from death benefits.

The Ninth Circuit quite properly interpreted Petitioners' arguments and defined Petitioners' burden of proof:[9]

> The difficulty with petitioners' position is that on its face the language of Section 909(e) is not ambiguous. Their position rests on an assumption that the choice of this unambiguous language by Congress, and its failure expressly to incorporate the maximum limitations of Section 906(b)(1), was inadvertent — that Congress had not meant to say what it had clearly said. The presumption to the contrary is not lightly to be overturned, and in our judgment petitioners have failed to meet their burden in this respect.

Petitioners failed to meet that burden, the court found, because the legislative history reveals how often this very issue was discussed during the hearings on the amend-

[8]*Director, Office of Workers Comp., et al. v. Rasmussen*, 567 F.2d 1385 (1978).

[9]Fed.Pet. at p. 8A.

ments, and because the final amendments to Section 9(e) were so "graphically illustrated". *Id.* at p. 11A.

The Ninth Circuit further gives proper deference to "a course legislatively chosen." *Id.* There the court discusses the suggestion that the removal of death benefit maximums is "so irrational" that it could not have been intended, no matter what the record revealed. The Court rightly finds that greater benefits in death cases had received favorable comment from the National Commission on State Workmen's Compensation. The court avoids substituting its own evaluation of the wisdom of such action, realizing that such action is not properly a function of judicial interpretation of statutes.[10]

In its analysis of the 1972 amendments to the Act, the Ninth Circuit finds another weakness in the argument that Congress must have intended to treat maximum death and disability benefits identically: those amendments result further in more favorable benefits to survivors in some minimum situations. See footnote 8 to the opinion, Fed.Pet. at p. 13A, 14A. The court correctly rejected the major rewriting of the statute that would have been required to bring disability and death benefits into a state of complete harmony.

[10]*Tennessee Valley Authority v. Hill, supra.* At 46 Law Week 4684 the Chief Justice writes: "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." See also *United States v. Public Utilities Comm. of Calif.* 345 U.S. 295, 73 S.Ct. 706 (1953). The D.C. Circuit seems to have avoided this discipline in *Director, Office of Workers Comp. v. Boughman*, 545 F.2d 210 (1976). In finding Section 6(b)(1) maximums apply to death benefits, that court said at 213 that "*[f]oremost* among our reasons for reaching this conclusion is the *common sense conviction* that Congress did not intend" to eliminate death benefit maximums. (Emphasis supplied).

Finally, the Ninth Circuit states what is often overlooked in this case: how simple it would have been for Congress to have provided clearly and unequivocally that the Section 6(b)(1) maximums were applicable to death benefits.[11]

In conclusion, the court stated:[12]

> We conclude that petitioners have failed to meet their burden of establishing that Congress did not knowingly and intentionally eliminate the maximum limitations on death benefits in Section 909(e).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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September, 1978

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[11] *Id.* at p. 12A.
[12] *Id.* at p. 14A.

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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1465
No. 77-1491

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

— v. —

GENEVIEVE O. RASMUSSEN, *et al.*,
Respondents.

GEO CONTROL, INCORPORATED, *et al.*,
Petitioners,

— v. —

GENEVIEVE O. RASMUSSEN, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 42(3) of the Supreme Court Rules, the American Insurance Association, Alliance of American Insurers and National Association of Independent Insurers respectfully move for leave to file the attached brief as Amici Curiae in support of petitioners. Counsel for peti-

tioners have consented to the filing of this brief. Counsel for respondents have not consented.

The interests of Amici are as follows:

The *American Insurance Association* is an association of 145 property-casualty insurance carriers. Its members write approximately 45 percent of the workers' compensation insurance premiums in the United States.

The *Alliance of American Insurers* is an organization of 119 property-casualty insurance carriers. Its members write approximately 25% of the workers' compensation insurance premiums in the United States.

The *National Association of Independent Insurers* is a voluntary trade association of over 400 insurance companies. Its members write approximately 10% of the workers' compensation premiums in the United States.

Section 32 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 932 (the "Act"), requires each employer to secure the payment of compensation required under the Act either by: (a) furnishing satisfactory proof of its financial ability to pay such compensation; or (b) obtaining workers' compensation insurance from an authorized carrier. To satisfy their obligations under the Act, and the several statutes into which it has been incorporated, many employers have obtained workers' compensation policies from members of Amici. Amici have thus been vitally concerned with the operation of the Act.

The question before this Court is whether, under the Act as amended, the weekly rate of death benefits is subject to the same maximum limitations applicable to benefits payable for disability. Elimination of the weekly maximum on death benefits, which has been an integral part of the

Act since its passage in 1927, would have a significant impact upon members of Amici and their existing and future workers' compensation contracts. In view of the importance of the case to the industry, the American Insurance Association participated as an amicus curiae before the Court of Appeals for the Ninth Circuit.

Amici have examined the language and legislative history of the Act and its 1972 amendments primarily in light of the workers' compensation system as a whole. Amici do not believe that the parties have considered the issue before this Court in precisely the same manner.

Amici therefore request that this Court grant leave to file the attached brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1465

No. 77-1491

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

— v. —

GENEVIEVE O. RASMUSSEN, *et al.*,

Respondents.

GEO CONTROL, INCORPORATED, *et al.*,

Petitioners,

— v. —

GENEVIEVE O. RASMUSSEN, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Statute Involved

This case involves the proper construction of Section 6(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 906(d), *as amended by* Pub. L. No. 92-576, 86 Stat. 1251 (1972) (the "Act"). The relevant

portions of the Act prior to and subsequent to the 1972 Amendments are reprinted in Appendix A and Appendix B, respectively, to this brief.

Question Presented

Are the maximum limitations for weekly benefits, as set forth in Section 6(b)(1) of the amended Longshoremen's and Harbor Workers' Compensation Act, applicable to death benefits by virtue of Section 6(d) of the Act?

Statement

As described in detail below, workers' compensation plans provide weekly benefits for on-the-job injuries to employees without regard to fault. Workers' compensation legislation has thus eliminated the fellow servant rule, assumption of risk, contributory negligence and other common law doctrines which often left workers without recourse for their injuries. However, in view of their no-fault provisions and in order to keep their costs within reasonable limits, workers' compensation plans, as originally adopted, uniformly imposed maximum limits on the weekly amounts which could be awarded for death and disability benefits.

For forty-five years following its passage in 1927, the Longshoremen's and Harbor Workers' Compensation Act[1] clearly provided for a fixed dollar amount as a maximum

[1] Act of March 4, 1927, c. 509, 44 Stat. 1424, *as amended by* Act of May 26, 1934, c. 354, 48 Stat. 806; Act of June 25, 1938, c. 685, 52 Stat. 1164; Act of June 24, 1968, c. 623, 62 Stat. 602; Act of July 26, 1956, c. 735, 70 Stat. 654; Act of July 14, 1961, Pub. L. No. 87-87, 75 Stat. 203; Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251.

on the weekly rate of both death and disability benefits. This maximum dollar amount, which was increased from time to time, was set forth in Sections 6(b) for disability and 9(e) for death.

In recent years, it has become clear that the use of fixed dollar maximums was inefficient because they required relatively frequent adjustment by Congress as wages increased. Moreover, pending Congressional action, the fixed dollar maximums on occasion resulted in unrealistically low limits on weekly payments for both death and disability benefits.

Accordingly, in 1972 Congress amended the Act. One of the principal purposes of the Amendments was, plainly, to eliminate fixed dollar maximums in favor of flexible maximums based upon a specified percentage of the national average weekly wage. The national average weekly wage changes annually and, therefore, benefits can be upgraded as appropriate without the need for further Congressional action. The result of this change has been to increase the weekly maximum from $70 in 1972 to $367.22 in 1978.

In order to make the switch from fixed dollar maximums to flexible limits, the 1972 Amendments rewrote the portions of the Act which dealt with weekly maximums. It is fair to say, however, that these Amendments are not in all respects a model of clarity.

Thus, for disability benefits Congress deleted the old fixed maximums and added a new Section 6(b)(1), 33 U.S.C. 906(b)(1), which specifically adopts the new flexible maximums. However, for death benefits, Congress deleted the fixed maximums previously contained in Section 9(e), 33 U.S.C. § 909(e), but did not rewrite 9(e) to

make it similar to Section 6(b)(1). Instead, Congress added a new section 6(d), 33 U.S.C. § 906(d), which ties the weekly death benefit maximums to the maximums set forth in Section 6(b)(1).

Since the new statutory language for death and disability benefits is not precisely parallel, some claimants have argued that, for purposes of the weekly maximum limitation, Congress intended to distinguish between disability benefits and death benefits. Although nowhere in the legislative history is there any mention of such a drastic change, these claimants have insisted that Congress intended, not to change the maximum from a fixed dollar limit to a flexible limit, but to remove the limit entirely for death benefits.

This position was rejected by the Director of the Labor Department's Office of Workers' Compensation Programs —the official who is charged with administering the Act and who was entirely familiar with the background of this legislation—and by the Courts of Appeals for the Third and District of Columbia Circuits.[2] After an exhaustive analysis of the language, legislative history and purposes of the amended Act, they concluded that the death benefits limitation imposed by the former Section 9(e) was retained in the new Section 6(d).

When the Senate subcommittee responsible for the 1972 Amendments reviewed the Act in 1974, it similarly concluded that:

> "Compensation for disability and death is based on the average weekly wage of the covered worker. Maximum benefits may not exceed a specified percentage of the national average weekly wage."[3]

[2] *Director, Office of Workers' Compensation Programs* v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976); *Director, Office of Workers' Compensation Programs* v. *Boughman*, 545 F.2d 210 (D.C. Cir. 1976).

In its decision below, however, the Court of Appeals for the Ninth Circuit reached a contrary result. Apparently of the view that the question could be resolved by reference to Section 9(e) alone, without regard to the remainder of the Act, the court virtually ignored Section 6(d) and the decisions of the other Courts of Appeals. Indeed, the Ninth Circuit dismissed Section 6(d) in a single footnote and the prior authority in a solitary sentence.

Review of the Ninth Circuit's decision was sought by the Solicitor General on behalf of the Director, Office of Workers' Compensation Programs, and by the employer and its insurance carrier. On June 12, 1978, this Court granted both petitions for writs of certiorari.

Summary of Argument

The Ninth Circuit held that because the 1972 Amendments rewrote Section 9(e) to remove the fixed dollar limitations for death benefits and did not provide any new maximum weekly limits in that section, weekly death benefits, unlike weekly disability benefits, are no longer subject to a maximum. To be sure, when the Act was amended in 1972, Congress removed all references to weekly death benefit maximums from Section 9(e). But that is hardly dispositive of the present case. The 1972 Amendments also

[3] Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Compilation of Selected Laws Pertaining to Labor Relations 769 (1974). *See also* A. Millus & J. Manes, The Longshoremen's and Harbor Workers' Compensation Act And Its Extensions 327 (1978).

added two new provisions to the Act—Sections 6(b)(1) and 6(d). As the Courts of Appeals for the Third and District of Columbia Circuits properly recognized, the issue here is whether Section 6(d) applies the flexible maximums set forth in Section 6(b)(1) to weekly death benefits.

The Ninth Circuit's opinion is wrong in three fundamental respects:

1. *The opinion below ignores the historical development of workers' compensation legislation.*

When Congress enacted the Longshoremen's Act in 1927, it imposed upon employers "liability without fault" and deprived them of those defenses which had been available under the common law. As a "counterbalancing advantage," employers received a limitation on their liability which was both certain and predetermined; they were "no longer to be exposed to the hazards of large tort verdicts." *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 140 (1956) (Black, J., dissenting). This trade-off was important, not only because it allowed workers' compensation statutes to survive attacks against their constitutionality, *see New York Central R. Co.* v. *White*, 243 U.S. 188, 203-04 (1917), but also because it made the system practical.

One important method for keeping the employer's liability certain and within bounds and the system practical has been the imposition of a maximum on weekly death benefits. While limitations on average weekly benefits prevent full replacement of incomes earned by employees in the highest income categories, they also assure that there will be sufficient funds available to provide a reasonable amount to all employees.

The maximum benefits under the Longshoremen's Act, which are generally supplemented by additional benefits and are non-taxable, provide more than adequate compensation. For example, as set forth in Appendix C, respondents can expect to receive some $746,786 if the Section 6(b)(1) limitations are applied. Absent the weekly ceiling, the expected award becomes $1,144,064—almost $400,000 or over 50 percent higher. Where benefits are paid over a longer period of time or where the average weekly wage is greater, the disparity becomes even more significant. *See* Appendix D. The worker's compensation system was never intended to provide for such unreasonable awards.

Accordingly, the worker's compensation laws, including the Longshoremen's Act, have consistently imposed maximums on weekly death benefits. Elimination of such maximums would constitute a most significant and drastic change which would be wholly inconsistent with the historical development of the workers' compensation system.

2. *The opinion below misconstrues the statutory language.* The Ninth Circuit, focusing on the language of Section 9(e), gave only the most superficial consideration to Section 6(d). In a footnote the court announced that Section 6(d) does not impose the Section 6(b)(1) maximums on weekly death benefits. According to the Ninth Circuit "all that [Section 6(d)] says" is that minimum death benefits will be upgraded annually. However, as the Courts of Appeals for the Third and District of Columbia Circuits concluded, such upgrading is already required by Section 10(f) of the Act. The Ninth Circuit's interpretation of the Act thus renders Section 6(d) completely superfluous, in violation of the most basic rules of statutory construction. *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

Moreover, the statutory construction adopted by the Ninth Circuit makes no sense. The court admitted that eliminating the maximum for death benefits while retaining it for disability benefits—where the needs of the employee and his or her family are likely to be greater—"'places a premium on death,'" 567 F.2d at 1387. This "creates a serious and unique anomaly" in the workers' compensation plan adopted by the Act. *Director, Office of Workers' Compensation Program* v. *Boughman*, 545 F.2d 210, 213 (D.C. Cir. 1976). It is hardly reasonable to construe a statute to reach such a result.

3. *The opinion below misconstrues the legislative history of the 1972 Amendments.*

The Ninth Circuit attempted to buttress its decision by referring to various passages from the House and Senate reports which accompanied the 1972 Amendments. These passages, however, establish no more than that Congress intended to remove the fixed dollar maximum from Section 9(e). They shed no light on whether, by virtue of Section 6(d), Congress intended to replace the fixed dollar maximum with the flexible maximums of Section 6(b)(1).

The Ninth Circuit also referred to various statements made about the bills as originally introduced into the 92d Congress. What the court failed to note, however, is that the bills were substantially revised after the hearings. The bills as introduced, which proposed to eliminate maximums on weekly death and disability benefits, did not contain what are now Sections 6(b)(1) and 6(d). These provisions were added after substantial opposition to the removal of the maximums surfaced during the hearings. Thus, statements about the effect of the bills as introduced provide no assistance in discerning the effect of Sections 6(b)(1) and 6(d).

The Ninth Circuit either overlooked or failed to give adequate consideration to other portions of the legislative history. For example, both the Senate and House Committees, as well as the principal Senate sponsor of the 1972 Amendments, explained the amendment to Section 6 of the Act as follows:

> "To the extent that employees receiving compensation for total permanent disability *or survivors receiving death benefits* receive less than the compensation they would receive if there were no *phase-in*, their compensation is to be increased as *the ceiling moves to 200%*." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972); H. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972). (Emphasis added.)

The references to "phase-in," "ceiling," and "200%" make no sense whatsoever unless the Section 6(b)(1) limitations apply to weekly death benefits. Those responsible for the 1972 amendments thus recognized that the phase-in limitations of Section 6(b)(1) would place a ceiling on the weekly benefits which survivors might otherwise have received. *See also* note 3 *supra* and accompanying text.

The Ninth Circuit also ignored the statement by the Senate Committee that its amendments to Section 6 were "fully consistent" with the recommendations contained in the Report of the National Commission on State Workmen's Compensation Laws.[4] Among the most significant of

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[4] S. Rep. No. 92-1125, 92d Cong., 2d Sess. 2 & 5 (1972).

The National Commission on State Workmen's Compensation Laws was created by Section 27 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 676, to study the adequacy of state compensation laws and to advise Congress on the desirability of federal action. The National Commission submitted its Report to Congress on July 31, 1972 just prior to passage of the 1972 Amendments.

the National Commission's recommendations was that both weekly disability and death benefits be limited, after an appropriate phase-in, to "at least 200% of the State's average weekly wage." There is absolutely nothing in the legislative history indicating that Congress intended to reject this recommendation with respect to death benefits, while at the same time fully adopting the recommendation with respect to disability benefits. Indeed, nowhere in the legislative history is there any indication of an intent to treat weekly death benefits and disability benefits differently.

There is, in short, no support in the legislative history of the 1972 Amendments for the Ninth Circuit's conclusion that Congress intended to eliminate completely the maximums on weekly death benefits while simultaneously retaining these maximums on disability benefits. Indeed, the legislative history is plainly to the contrary. In view of the historical development of workers' compensation legislation, any elimination of a ceiling on death benefits would obviously be a most drastic change. The absence of any clear indication that the 1972 Amendments effected this result is persuasive evidence that Congress never intended such a result.

Argument

I.

The Ninth Circuit Has Failed to Construe the Longshoremen's Act in Conformance With Its Historical Development.

The Longshoremen's and Harbor Workers' Compensation Act, originally passed in 1927, was patterned after the New York Workmen's Compensation Law. *See* H.R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926). It was "designed to accomplish the same general purpose as the workmen's compensation laws of the States." *Crowell* v. *Benson,* 285 U.S. 22, 40 (1932). *See also Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 258 (1977) (the "Act was, in a sense, a typical workmen's compensation system. . . . "). It is clear, from an examination of the background and nature of the workers' compensation system, that the Ninth Circuit has failed to construe the Longshoremen's Act in conformance with the Act's history.

A. *Limitations on Weekly Death Benefits Have Been an Important Part of the Longshoremen's Act and the Workmen's Compensation System.*

Just after the turn of this Century, industrial injury rates in the United States reached an all-time peak. Injured workers or survivors of deceased workers found, however, that tort remedies available under the common law were less than adequate. Courts tended to lack sympathy for their complaints, and the defenses of contributory negligence and assumption of risk and the fellow servant doctrine made it difficult to recover from an employer.

Furthermore, even where an injured worker could recover, the fact that the compensation system was based upon liability for negligence imposed high legal costs and made for long delays. Indeed, in many instances, even an employee who successfully obtained a judgment was unable to collect because the employer was judgment proof. *See generally* National Commission Report at 33-34.

The workers' compensation laws were developed in the early part of the Twentieth Century to remedy many of these problems.[6] The "most radical" feature of these laws was the "establishment of a legal principle alien to the common law: liability without fault." National Commission Report at 34. Under the new system, the employer lost defenses which had been available under common law and was required to bear the costs of all work-related injuries without regard to his fault—either directly or

[6] With the support of both the National Association of Manufacturers and the American Federation of Labor, the workers' compensation laws achieved rapid acceptance. Between 1911 and 1920, 42 states enacted workers' compensation statutes. Today, all 50 states and the District of Columbia have such legislation. National Commission Report at 32-33.

In 1908 Congress enacted a compensation act covering certain federal employees. National Commission Report at 34. This was followed in 1927 by the Longshoremen's and Harbor Workers' Compensation Act. *See generally Northeasst Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-58 (1977). The provisions of the Longshoremen's Act were subsequently incorporated into several other laws. *See* Defense Base Act, 42 U.S.C. § 1651; War Hazards Compensation Act, 42 U.S.C. § 1701; Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c); Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171. *See also* District of Columbia Workmen's Compensation Code, D.C. Code § 36-501.

As a result of these various extensions, more than one million workers, including the many highly-paid workers in the District of Columbia, are covered by the Act. Comment, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After The 1972 Amendments*, 55 Tex. L. Rev. 99, 99 & n.2 (1976).

through premiums to insurance companies.[7] And the benefits available to employees can be quite generous. As noted, at present the maximum weekly benefit is $367.22. This means that a 25-year old widow whose husband earned $15,000 per year could expect to receive a total of $2.5 million in death benefits during her lifetime.[8]

In return for "no fault," the employer received a limitation on his liability which was both "certain" and "predetermined." *See* National Commission Report at 32, 34, 38. Justice Black, writing in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) (dissenting opinion), noted that the Act was

> "revolutionary in its field . . . Congress weighed the conflicting interests of employers and employees and struck what was considered to be a fair and constitutional balance. Injured employees thereby lost their chance to get large tort verdicts against their employers, but gained the right to get a sure though frequently a more modest recovery. . . . *And while Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. They were no longer to be subjected to the hazards of large tort verdicts.*" 350 U.S. at 140 (footnote omitted) (emphasis added).

[7] Some large companies, such as Ford Motor Company, are self-insured. Most employers, however, make insurance arrangements with a private carrier. As of 1972, workmen's compensation insurance was written by private carriers in 32 states; in 12 states, private and state operated carriers competed; in 6 states (Ohio, North Dakota, West Virginia, Wyoming, Washington and Nevada), insurance was provided by state operated carriers. *See* National Commission Report at 33.

[8] A. Millus, *supra* note 5, at 322. This example assumes that the widow is childless and does not remarry, and that the annual rate of escalation, *see* 33 U.S.C. § 910(f), is 6 percent. It should be noted that the rate of escalation has been over 7 percent for each of the last two years.

Thus, the "basic *quid pro quo* of workmen's compensation is that the employer assumes nonfault liability, but in return has his liability restricted to wage-loss restoration *within fixed limits.*" Larson, *Compensation Reform in the United States,* in Occupational Disability and Public Policy 41 (E. Cheit and M. Gordon ed. 1963) (emphasis added). *See also Smithers & Co.* v. *Coles,* 242 F.2d 220 (D.C. Cir. 1957).

It was this *quid pro quo* which allowed workers' compensation statutes to survive attacks against their constitutionality. Many of the early statutes were, in fact, declared unconstitutional by state courts as a deprivation of property without due process. National Commission on State Workmen's Compensation Laws, Compendium on Workmen's Compensation 17-18 (1973) ("National Commission Compendium"). However, in *New York Central R. Co.* v. *White,* 243 U.S. 188 (1917), this Court sustained the constitutionality of the New York law, upon which the Longshoremen's Act was modeled, concluding that it was constitutional

> "to supplant a system under which [the employee] assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale." 243 U.S. at 204. *See also id.* at 203-04.

The importance of the cost-containment aspects of workers' compensation plans has been widely acknowledged. Workers' compensation simply "cannot afford to be both

a nonfault insurance system and a source of tort damages if it is to remain within reasonable cost bounds." *Larson, supra,* at 41. For example, the New York Court of Appeals recently noted that, since the establishment of the workers' compensation system, it has been recognized that

> "*measures had to be taken which would ensure that the cost of providing this protection to injured employees did not escalate to the point of economic impracticality* (see 1 Larson, Workmen's Compensation Law, § 2.70, pp. 13-14). . . . [R]ealizing that a workable system of compensation could not totally redress an injured employee's injuries and remain a financially viable institution at the same time, a decision was reached whereby a limitation was placed on the amount of benefits recoverable by a compensation claimant (see Workmen's Compensation Law, §§ 12, 15, subd. 2)." *Granger* v. *Urda,* 44 N.Y.2d 91, ——, 404 N.Y.S. 2d 319, 321, 375 N.E.2d 380, 382 (1978) (emphasis added).

This concern with cost containment is understandable because costs have been most significant, particularly when one considers that only small percentages of injured workers would have ever recovered damages under common law.[9] In 1971, before the passage of the 1972 Amendments, premiums cost employers just over $4 billion. The cost for 1977 has been estimated to be some $10 billion.[10]

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[9] *See* National Commission Compendium at 11 (estimating that not more than 15 percent of injured employees ever recovered damages under the common law).

[10] National Council on Compensation Insurance, Annual Report of the National Council on Compensation Insurance ii (1978). These figures do not include the premiums paid in the six "monopolistic funds" states where workers' compensation insurance is provided solely by state-operated carriers. *See* note 7 *supra.* Nor do they include the cost of workers' compensation to those companies which are self-insured. Obviously, therefore, the costs are even greater than the cited figures suggest.

To effectuate the goals described above, workers' compensation statutes have consistently imposed a ceiling on both weekly death benefits and disability benefits. In some instances, the maximum has been expressed as a fixed dollar amount; and more recently in many states, as a percentage of the state's average weekly wage.[11] These limitations reflect the principle that the system was never intended to replace in full the high incomes earned by employees in the highest income categories, but only to provide reasonable compensation to all employees. They have been an important means by which the employer's liability is kept certain and within fixed limits and by which the system has remained practical.

B. *The Maximum Weekly Benefits Under the Act Provide for Most Generous Compensation.*

As noted, the maximum weekly benefits under the longshoremen's Act provide for most generous compensation. These benefits, which are presently $367.22 per week, will steadily increase over the years. Indeed, the rate of escalation has recently been over 7 percent annually. Pursuant to Section 10(f) of the Act, 33 U.S.C. § 910(f), those

[11] National Commission Report at 33; *Director* v. *Boughman, supra,* 545 F.2d at 213. *See also* Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals,* 1963 Wis. L. Rev. 57, 58 (noting that the original acts placed maximums of $10-$15 per week).

The National Commission and the Model Act (published by the Council of State Governments) both recommended that the maximum limitation on death benefits and total disability benefits be based upon a percentage of the state's average weekly wage. National Commission Report at 64-65, 71. As of 1973, 13 states had set their maximum weekly disability benefits as a percentage of their average weekly wage, and the Federal Employees Compensation Act based its maximum on 75 percent of the pay of specified grade levels in the Federal Civil Service. National Commission Compendium at 116, 124. Only two of these jurisdictions did not also have flexible maximums for death benefits. *Id.* at 141. Today, 37 workers' compensation laws (including the Longshoremen's Act and the D.C. Code) provide for flexible maximums.

individuals entitled to survivors benefits will have their weekly benefits adjusted in accordance with the annual rate of escalation.

As set forth in Appendix C, respondents can thus expect to receive a total of some $746,786 in weekly death benefits. This assumes escalation of only 6 percent annually and life expectancy of just under 20 years. Obviously, if the benefits are paid over a longer period of time or if the escalation rate is higher, the total amount awarded is even greater. Appendix D, for example, illustrates a recent case arising in Illinois. As this demonstrater, a 44-year old spouse whose husband's average weekly wage was $1,404 could expect to receive the maximum award of $1,723,336, if the provisions of Section 6(b)(1) of the Longshoremen's Act were applied.

The maximum awards are, in short, most reasonable—particularly since they are given without regard to the employer's fault, constitute non-taxable income and are frequently supplemented by other benefits. These awards are more than sufficient to assure the type of continued income for which workers' compensation laws have been designed.

On the other hand, elimination of the maximums on weekly death benefits would result in awards which are unnecessarily and unjustifiably higher. For example, if the weekly maximum were removed, respondents could expect to receive an award which is nearly $400,000 or over 50 percent greater than the award limited by the Section 6(b)(1) maximums. *See* Appendix C. Similarly, in the Illinois case, the spouse could expect an award more than 100 percent or $2,200,000 higher. *See* Appendix D.

• • •

In short, while limitations on average weekly benefits prevent full replacement of incomes earned by employees in the highest income category, they also assure that there will be sufficient funds available to provide a reasonable amount to all employees. Accordingly, the workers' compensation laws, including the Longshoremen's Act, have consistently provided for maximums on weekly death benefits. Elimination of such maximums would constitute a most significant and drastic change which would be wholly inconsistent with the historical development of the workers' compensation system.

II.

The Ninth Circuit's Interpretation of the Act Violates Fundamental Principles of Statutory Construction.

A. *The Ninth Circuit's Interpretation Renders Section 6(d) Meaningless.*

As a result of the 1972 Amendments, the fixed dollar maximums previously contained in Section 9(e) for weekly death benefits and in Section 6(b) for weekly disability benefits were removed. However, two new provisions dealing with maximums were added. Section 6(b)(1) provides that compensation for "disability" shall not exceed the following percentages of the "applicable national average weekly wage":

> "(A) 125 percentum or $167, whichever is greater, during the period ending September 30, 1973.
>
> "(B) 150 percentum during the period beginning October 1, 1973, and ending September 30, 1974.
>
> "(C) 175 percentum during the period beginning October 1, 1974, and ending September 30, 1975.
>
> "(D) 200 percentum beginning October 1, 1975."

The other provision added by the 1972 Amendments, Section 6(d), provides:

> "(d) Determinations under this subsection with respect to a period shall apply to employees *or survivors* currently receiving compensation for permanent total disability *or death* benefits during such period, as well as those newly awarded compensation during such period." (Emphasis added.)

The Third and District of Columbia Circuits both construed "determinations under this subsection" as referring to the determinations required by Section 6 of the Act, including Section 6(b)(1).[12] As the Third Circuit noted, the "meaning" of Section 6(d) "thus becomes apparent":

> "Under § 6(b)(1)(B) benefits awarded between October 1, 1973 and September 30, 1974 may not exceed 150 per cent of the national average weekly wage. Thereafter, benefits awarded beginning October 1, 1974 and ending September 30, 1975 cannot exceed 175 per cent of the national average wage under § 6(b)(1)(C). Section 6(d) serves to insure that the recipients of either disability *or* death benefits during the phase-in period will receive the current maximum for that period regardless of whether they have been receiving such benefits since an earlier period or whether they were just awarded compensation during that period. Therefore, a person awarded benefits during the § 6(b)(1)(B) period and limited by the maximum of 150 per cent of the national average weekly wage will be subject to the new maximum of 175 per cent of

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[12] The amendments to Section 6 were contained in Subsection (a) of Section 5 of the 1972 Amendments. There is, accordingly, no question that the term "this subsection" in Section 6(d) refers to Section 6 of the Act. *See Director* v. *O'Keefe, supra,* 545 F.2d at 344; *Director* v. *Boughman, supra,* 545 F.2d at 215. Nor can it be seriously disputed that Section 6(b)(1) requires "[d]eterminations . . . with respect to a period." *See Director* v. *O'keefe, supra,* 545 F.2d at 344.

the national average weekly wage from the beginning of the § 6(b)(1)(C) period just as someone awarded benefits during the § 6(b)(1)(C) period." 545 F.2d at 344-45.

The Ninth Circuit, on the other hand, held that "determinations under this subsection" referred only to those determinations of national average weekly wage required by Section 6(b)(3),[13] and that the reference to "death benefits" meant the *minimum* death benefits specified in Section 9(e).[14] According to the court, Section 6(d) thus had a "clear limited meaning":

> "[*A*]*ll it says* is that the Secretary's determination of national average weekly wages with respect to a certain period shall not only apply to those who first begin receiving compensation during that period, but shall also apply to those who are already receiving benefits." 567 F.2d at 1388 n.5. (Emphasis added.)

It is impossible to discern the basis for the *ipse dixit* that Section 6(d) has the "clear limited meaning" which the

[13] Section 6(b)(3), which was also added by the 1972 Amendments, provides in relevant part:

> "(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of each year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year."

[14] When Congress amended Section 9(e) it also eliminated the fixed dollar minimum on weekly death benefits and replaced it with a minimum tied to the national average weekly wage. As amended, Section 9(e) provides: "In computing death benefits the average weekly wage of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased. . . ."

Ninth Circuit ascribed to it. As the Third Circuit observed, there is absolutely

> "nothing in the text of § 6(d) from which we can conclude that the 'determinations' to which § 6(d) refers, extend solely to the calculation of the national average weekly wage and not to the [Section 6(b)(1)] phase-in limitations upon benefits." 545 F.2d at 345-46.

As the decisions of the Third and District of Columbia Circuits also make clear, the Ninth Circuit's construction of Section 6(d) renders that provision duplicative of Section 10(f) of the Act and therefore "superfluous in the statutory scheme." Section 10(f), 33 U.S.C. § 910(f),[15] which was added by the 1972 Amendments, provides for annual upward adjustments in minimum death benefits based upon changes in the national average weekly wages. "A mathematical calculation reveals that the effect of § 10(f) is identical to that of § 6(d) under [the Ninth Circuit's theory]." *Director* v. *O'Keefe, supra* note 2, 545 F.2d at 346.[16] Such a result violates the most elementary

[15] Section 10(f) states:

> "(f) Effective October 1 of each year the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1."

[16] Referring to the Review Board's construction of Section 6(d) in this case, which is identical to the Ninth Circuit's construction, the District of Columbia Circuit similarly concluded that:

> "Persons receiving the minimum death benefits (like all others 'currently receiving compensation for permanent total disability or death benefits') are unquestionably entitled to increases in compensation each October 1 by Section 10(f)

canons of statutory construction, which require that every portion of a statute be interpreted to give it independent meaning. *United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955); *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307-08 (1961).

B. *The Ninth Circuit's Interpretation Leads to Absurd Results.*

The Ninth Circuit has construed the Act as eliminating the maximum on weekly death benefits, while at the same time retaining a maximum on weekly disability benefits. As the Ninth Circuit itself recognized, this construction puts "'a premium on death'" so that "'a totally disabled employee, in need of continuing care, [is] compensated less generously than the family of an employee who dies.'" 567 F.2d at 1387. Under this construction, families of certain disabled employees who later die from *unrelated* causes would suddenly receive an increase in benefits. *See* 33 U.S.C. § 909 (requiring the payment of death benefits "if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury"). The court's holding that survivors of a deceased employee are in a position superior to all the claimants under the Act "creates a serious and unique anomaly." *Director* v. *Boughman, supra,* 545 F.2d at 213.

Accordingly, the Act has consistently placed similar maximums on weekly death benefits and disability bene-

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of the Act as amended. Such increases pursuant to Section 10(f) are equal to those that would be arrived at by the effect of Section 6(d) as construed by the Board. Thus if Section 6(d)'s statement that the newly determined national average wage is applicable to survivors currently receiving death benefits has no meaning beyond that to which it was limited by the Board, it is entirely duplicative of and included in Section 10(f)." 545 F.2d at 216.

fits.[17] State workers' compensation laws have also consistently imposed maximums on both weekly death and disability benefits. The National Commission, in recommending this approach, explained that "the arguments . . . concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases. . . ." National Commission Report at 71.[18] To the

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[17] Under Section 8 of the original Act, disabled employees were entitled to 66⅔ percent of their average weekly wages. Act of March 4, 1927, c. 509, 44 Stat. 1424, 1427-29. Section 6(b), however, placed a maximum of $25 on these weekly benefits. 44 Stat. 1426. Under Sections 9(b)-(d) of the original Act, the total amount payable to survivors could not exceed 66⅔ percent of the deceased's average weekly wages. 44 Stat. 1430. Section 9(e), however, provided: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $37.50. . . ." 44 Stat. 1430. Thus, notwithstanding the wages actually earned by the deceased, his survivors were entitled to a maximum benefit of $25 per week (66⅔ percent of $37.50), which was precisely the same benefit to which disabled employees were entitled. While Congress often amended these provisions to increase the dollar amounts, it steadfastly retained the same relationship which the maximum weekly award for death bore to the maximum weekly award for disability. *See* Act of July 14, 1961, Pub. L. No. 87-87, §§ 1 and 2, 75 Stat. 203 ($70 and $105, respectively); Act of July 26, 1956, c. 735, §§ 1 and 4, 70 Stat. 654, 655 ($54 and $81, respectively); Act of June 25, 1948, c. 623, §§ 1 and 3, 62 Stat. 602 ($35 and $52.50, respectively); Act of March 4, 1927, c. 509, §§ 6(b) and 9(e), 44 Stat. 1426, 1430 ($25 and $37.50, respectively).

[18] This Court has also recognized that, given the purposes of workers' compensation, there is no basis for distinguishing between death benefits and disability benefits. In *Madera Sugar Pine Co.* v. *Industrial Accident Comm'n,* 262 U.S. 499 (1923), the Court stated:

> "Provision is universally made in workmen's compensation acts for compensation not only to disabled employees but to the dependents of those whose injuries are fatal. And *the two kinds of payment are 'always regarded as component parts of a single scheme of rights and liabilities arising out of' the relation of employer and employee. . . .* The object of such acts 'is single—to provide for the liability of an employer to make compensation for injuries received by an employee', whether to the employee himself or to those who suffer pecuniary loss by reason of his death." 262 U.S. at 501 (emphasis added.)

extent that any distinction can be made, there is a stronger economic basis for imposing a maximum on death benefits than on disability benefits:

> "'Although death is the ultimate work-related tragedy, the economic loss associated with death cases is often less than that of a permanent total disability.'" *Director* v. *Boughman, supra,* 545 F.2d at 213 n.8.

Accordingly, those states that have made a distinction have imposed a higher maximum on weekly disability benefits than on weekly death benefits. *Compare* United States Chamber of Commerce, Analysis of Workmen's Compensation Laws Chart V (1977), *with id.* Chart VII.

In short, it has never been the policy of the Longshoremen's Act or the other workers' compensation laws to place a premium on death. The Ninth Circuit, however, has adopted a construction of the Act which, it observes, has precisely this effect. This unique and unprecedented result has no basis in the workers' compensation system. Certainly, in the absence of any clear indication that Congress intended such a result, the Ninth Circuit's construction is improper.

III.

The Ninth Circuit's Construction of the Longshoremen's Act Is Neither Supported by Nor Consistent With the Legislative History of the 1972 Amendments.

In determining that the Act imposed no maximum on weekly death benefits, the Ninth Circuit referred to various passages in the House and Senate reports accompanying the 1972 Amendments.[19] These passages, however,

[19] For example, the court quoted the following section-by-section description in the House Report:

establish no more than that Congress intended to remove the *fixed dollar maximum* on weekly death benefits which had appeared in Section 9(e) of the original Act.[20] They do not address the issue in this case—whether, by virtue of Section 6(d), Congress replaced the fixed dollar maximum with the flexible maximums set forth in Section 6(b)(1).[21]

The Ninth Circuit also referred to various statements made regarding the proposed elimination of maximums by the bills as originally introduced into the Ninety-Second Congress. 567 F.2d at 1388-89. What the court failed to note, however, is that these bills were substantially revised

> "'Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under persent [sic] law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the Act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased.'" 567 F.2d at 1389 n.7, *quoting* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 19 (1972).

[20] The D.C. Circuit, in *Director* v. *Boughman,* observed that the langauge quoted in note 19 *supra* is no more than a "straightforward explanation of the literal effect of Section 10(d) of the amendments on Section 9(e) of the Act taken by itself." 545 F.2d at 214. *See also Director* v. *O'Keefe, supra,* 545 F.2d at 344 n.14 (House Report "merely restates the obvious effect on the 1972 amendments upon § 9").

[21] Referring to the legislative history upon which the Ninth relied, *see* note 19 *supra,* the D.C. Circuit further concluded:

> "Although the House Committee's description is perfectly accurate, therefore, in saying that the maximum limitations formerly contained in Section 9(e) were eliminated, this does not even face the question of whether the maximum limits contained in Section 6(b)(1) of the Act are applicable to death benefits. Certainly Congress intended to eliminate any maximum *dollar* limitation on death benefits. Yet the real issue is whether Congress intended to eliminate all maximums on death benefits or just to change the nature of the maximum. On this issue the Committee's statement . . . is unpersuasive either way." 545 F.2d at 214.

after opposition to elimination of the maximum benefits surfaced during the hearings. Among the revisions was the addition of Sections 6(b)(1) and 6(d).

More specifically, two pairs of identical bills were introduced during the Ninety-Second Congress. The first pair would have removed the fixed dollar amounts in Sections 6(b) and 9(e) of the original Act and would not have replaced them with any other provision.[22] The other pair of bills would have retained, but increased, the fixed dollar maximums on both types of benefits, thereby continuing the pattern[23] of placing a maximum on compensation in disability cases which was 66⅔ percent of the maximum wages to be considered in death cases ($110 and $178, respectively).[24] It is significant to note, as did the D.C. Circuit, that notwithstanding their "considerable differences," each of these bills would have "continued to treat deaths and disabilities in the same way—either both subject to the same maximum or neither subject to any maximum except two thirds of the employee's wages." *Director* v. *Boughman, supra* note 2, 545 F.2d at 215.

During the hearings on the bills, there was substantial opposition to the elimination of weekly maximums on death and disability benefits. The Labor Department,[25] workers'

[22] S. 2318, 92d Cong. §§ 4(a) & 10(b) (as introduced); H.R. 12006, 92d Cong., §§ 4(a) & 10(b) (as introduced).

[23] *See* note 17 *supra*.

[24] S. 525, 92d Cong., §§ 4(a) and 8(c); H.R. 3505, 92d Cong., §§ 4(a) and 8(c).

[25] The then-Secretary of Labor, James D. Hodgson, for example, testified that the elimination of ceilings on weekly compensation would "stimulate litigation" and "complicate and delay administrative proceedings." Noting that the "principle of workmen's compensation is to minimize, not encourage litigation," the Secretary of Labor urged that the maximums be retained. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess. 31 (1972) ("1972 Senate Hearings").

compensation carriers,[26] and employers,[27] all testified in opposition to this proposal.[28] Furthermore, on July 31,

[26] The American Insurance Association ("AIA") submitted a statement urging that "some reasonable ceiling" be placed on weekly compensation." The AIA wrote:

> "Benefits under the Longshoremen's and Harbor Workers' Act are applicable to the District of Columbia. There are many highly paid executives working in the District. The compensation system is not designed primarily for their protection, yet large payments in such cases would add substantially to the cost of compensation." (Footnote omitted.)

Longshoremen's and Harbor Workers' Compensation Act. Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 Before the Select Subcommitttee on Labor of the House Education and Labor Committee, 92d Cong., 2d Sess. 331 (1972) (1972 House Hearings). These views were also presented to the Senate. 1972 Senate Hearings at 714.

A representative of The American Mutual Insurance Alliance (now named the Alliance of American Insurers) similarly testified:

> "There is also widespread agreement that a reasonable maximum limit on weekly cash benefits is consistent with the objectives of workmen's compensation, . . . [Workers' compensation is not] intended to replace in full the high incomes earned by employees in the highest income categories. To do so would be costly and inappropriate in a system providing benefits to all injured employees without regard to their own negligence." 1972 House Hearings at 228 (testimony of Andre Maisonpierre). *See also id.* at 230; 1972 Senate Hearings at 234-35.

[27] For example, representatives of the Shipbuilders Council of America and the National Maritime Compensation Committee suggested that, consistent with the recent action of a number of states, the maximum should be tied to the average weekly wage in the shipbuilding and ship repair industry. 1972 Senate Hearings at 171-72, 175, 182-83, 203-04, 218 (testimony of Ralph Hartman); *id.* at 318-23, 334 (testimony of Edward Vickery).

[28] *See also* 1972 Senate Hearings at 164 (testimony of Joseph Koonz) (observing that some members of the Senate Committee expressed "concern" over the absence of a maximum on weekly benefits).

1972, immediately after the close of the hearings, the National Commission released its Report. The National Commission recommended that both weekly disability and death benefits be limited, after an appropriate phase-in period, to 200% of the State's average weekly wage. National Commission Report at 72.

These views obviously had an impact. On September 13, 1972, the Senate Committee on Labor and Public Welfare reported a substantially revised version of S. 2318, which was ultimately passed by the Senate and House.[29] This version did eliminate the fixed dollar maximum on weekly death and disability benefits which had appeared in Sections 9(c) and 6(b), respectively. Unlike the earlier proposed bills, however, the revised version amended Section 6 of the Act by adding two new provisions—Section 6 (b)(1) and Section 6(d). Thus, statements about the effect of the bills as introduced also provide no assistance in discerning the effect of Sections 6(b)(1) and 6(d).

There is, in short, absolutely no support for the Ninth Circuit's decision in the legislative history of the 1972 Amendments.[30] In fact the legislative history that exists is clearly to the contrary.

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[29] S. 2318 was passed by the Senate on September 14, 1972 (118 Cong. Rec. 30670, 30674). H.R. 12006 was passed by the House on October 14, 1972 (118 Cong. Rec. 36376, 36389), and returned to the Senate, which concurred in the House version (118 Cong. Rec. 36265, 36274).

[30] The Ninth Circuit suggested that Congress reached a compromise whereby it eliminated the maximum on death benefits but retained the maximum on disability benefits. There is, of course, nothing in the legislative history which even hints at such compromise. On the contrary, to the extent that Congress compromised, it did so by substantially increasing death benefits, while at the same time retaining the maximum on the weekly death benefits. For example, by tying the maximum and minimum (*see* 33 U.S.C. § 909(e)) death benefits to the national average weekly wage, Congress believed that approximately 90% of the covered employees would receive ⅔ of their average weekly wages; this represented a considerable increase over past practice. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972). In addition, Congress added Section 10(f) to the Act, 33 U.S.C. § 910(f), which provides for an annual readjustment of weekly benefits. Under Section 10(f) total disability and death benefits are automatically raised by the same percentage that the national average weekly wage has been raised. Furthermore, Congress increased the maximum on funeral expenses from $400 to $1,000. *See* 33 U.S.C. § 909(a). It also raised the percentage of average weekly wages that would be awarded to a widow from 35% to 50% and the percentage that would be awarded to surviving children from 15% to 16⅔%. This was, of course, subject to the same earlier limitation that the "total amount payable shall in no case exceed 66⅔ percentum" of the deceased's average weekly wage. 33 U.S.C. §§ 909(b)-(d). Congress also provided for survivor benefits where an employee with a permanent total disability dies from an unrelated cause. *See* 33 U.S.C. § 909.

First, both the Senate and House Committees, as well as Senator Williams, the principal Senate sponsor of the 1972 Amendments, explained the amendment to Section 6 of the Act as follows:

> "To the extent that employees receiving compensation for total permanent disability *or survivors receiving death benefits* receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased *as the ceiling moves to 200 percent.*" (Emphasis added).[31]

The references to "phase in," "ceiling" and "200 percent" make no sense whatsoever unless the Section 6(b)(1) limitations apply to weekly death benefits. Thus, as this language makes clear, those responsible for the 1972 Amendments recognized that the phase-in period limitations of Section 6(b)(1) would place a ceiling on the maximum benefits which "survivors" might otherwise have received.

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[31] S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972).

Senator Williams' remarks are set forth at 118 Cong. Rec. S. 18272 (daily ed., Oct. 14, 1972).

This language "dispels any notion that § 6(d) was," as the Ninth Circuit held, "intended to relate only to minimum death benefits."[32] *Director* v. *O'Keefe, supra,* 545 F.2d at 346. *See also Director* v. *Boughman, supra,* 545 F.2d at 215-16.

Second, the Senate Committee noted that it had given "most careful consideration to the recommendations" contained in the report of the National Commission on State Workmen's Compensation Laws, and that its proposed amendments of Section 6 were "fully consistent" with these recommendations. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 2 & 5 (1972). It is simply impossible to reconcile this statement with the Ninth Circuit's construction of the Act. Among the most significant of the National Commission's recommendations was that both weekly disability and death benefits be limited, after an appropriate phase-in period, to "at least 200 per cent of the State's average weekly wage." *See* page 28 *supra.* There is absolutely nothing in the legislative history of the 1972 Amendments indicating that Congress intended to reject this recommendation with respect to death benefits, while at the same time fully adopting the recommendation with respect to disability benefits. *Director* v. *Boughman, supra,* 545 F.2d at 215 n.15. *See also Director* v. *O'Keefe, supra,* 545 F.2d at 347.

Third, a careful review of the legislative history of the 1972 Amendments fails to reveal any instance where Con-

[32] The Ninth Circuit itself felt constrained to admit that the language in the Committee reports "suggests that the gradual increase in the maximum limitations provided by [Section 6(b)(1)] should apply to survivors as well as to disabled employees." 567 F.2d at 1388 n.5. The court, however, attempted to explain this language away by declaring that it is "ambiguous" and "outweighed" by the other legislative history. *Id.*

gress expressed an intent to distinguish between death benefits and disability benefits. This is most significant. Since its passage in 1927 the Act consistently treated weekly death benefits and disability benefits in the same manner by imposing a maximum on each. *See* note 17, *supra.* As the D.C. Circuit explained in rejecting the position of the Ninth Circuit,

> "Foremost among our reasons for reaching this conclusion is the common-sense conviction that Congress did not intend to provide, without ever so stating and in sharp contradistinction to every previous version of the Act, that a totally disabled employee in need of continuing care, should be compensated less generously than the family of an employee who dies." 545 F.2d at 213.

Fourth, subsequent to the passage of the 1972 Amendments, the Senate Subcommittee responsible for these Amendments noted that weekly death benefits under the 1972 Act are limited by the Section 6(b)(1) maximums. In its Compilation of Selected Labor Laws Pertaining to Labor Relations (1974), the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare noted:

> *"Amount of Benefits"*
>
> *"Compensation for disability and death is based on the average weekly wage of the injured worker. Maximum benefits may not exceed a specified percentage of the national average weekly wage.* The percentage increases from 125 prior to September 30, 1973, to 200 beginning October 1, 1975. The minimum is 50% of the national average weekly wages or the employees' actual weekly wage, whichever is less." *Id.* at 469. (Emphasis added.)

This observation, which is persuasive extrinsic evidence of congressional intent, *see Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969), was not even mentioned by the Ninth Circuit.

Finally, as discussed above, limitations on weekly death benefits have traditionally been an integral part of the workers' compensation system. It is unthinkable that Congress would have repealed such a fundamental aspect of the system without clearly expressing an intent to do so.

Conclusion

For the foregoing reasons, Amici submit that the Ninth Circuit's construction of the Longshoremen's and Harbor Workers' Compensation Act is wrong. As the Courts of Appeals for the Third and District of Columbia Circuits have held, weekly death benefits are subject to the maximums set forth in Section 6(b)(1) by virtue of Section 6(d). The decision of the Ninth Circuit should, therefore, be reversed.

Respectfully submitted,

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Appendices

APPENDIX A

Longshoremen's and Harbor Workers' Compensation Act (Prior to 1972 Amendments)

Before its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 6(b):

> (b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That if the employee's average weekly wages, as computed under section 910 of this title, are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

Sections 9(b) & (e):

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> • • • • •
>
> (b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each such child; in the case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving

child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages. • • •

• • • • •

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

APPENDIX B

Longshoremen's and Harbor Workers' Compensation Act (Subsequent to 1972 Amendments)

As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in relevant part:

Sections 6(b) & (d):

(b)(1) • • • [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1975.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average

weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

• • • • •

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Sections 9(b) & (e):

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

• • • • •

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each such child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child

shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages. • • •

• • • • •

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Section 10(f):

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

APPENDIX C

Comparison of Death Benefits With and Without Maximum Weekly Limitation— Rasmussen v. Geo Control, Inc.

Year[1]	Age of Spouse[2]	Age of Child[3]	Weekly Benefits[4] With Maximum[5]	Weekly Benefits[4] Without Maximum[6]	Annual Benefits[7] With Maximum	Annual Benefits[7] Without Maximum
1973	55	17	167.00	532.00	3,372	10,741
1974	56	18	210.54	563.92	10,948	29,324
1975	57	19	261.00	597.76	13,572	31,084
1976	58	20	318.38	633.62	16,556	32,948
1977	59	21	342.54	671.64	17,812	34,925
1978	60	22	367.22	711.94	19,095	37,021
				754.65		1,834
1979	61	23	389.25	565.99	20,241	28,056
1980	62	xx	412.61	599.95	21,456	31,197
1981	63	xx	437.36	635.95	22,743	33,069
1982	64	xx	463.61	674.10	24,108	35,053
1983	65	xx	491.42	714.55	25,554	37,157
1984	66	xx	520.91	757.42	27,087	39,386
1985	67	xx	552.16	802.87	28,712	41,749
1986	68	xx	585.29	851.04	30,435	44,254
1987	69	xx	620.41	902.10	32,261	46,909
1988	70	xx	657.64	956.23	34,197	49,724
1989	71	xx	697.09	1013.60	36,249	52,707
1990	72	xx	738.92	1074.42	38,424	55,870
1991	73	xx	783.25	1138.88	40,729	59,222
1992	74	xx	830.25	1207.21	43,173	62,775
1993	75	xx	880.06	1279.65	45,763	66,542
1994	76	xx	932.87	1356.43	48,509	70,534
1995	77	xx	988.84	1437.81	51,420	74,766
1996	78	xx	1048.17	1524.08	54,505	79,252
1997	79	xx	1111.06	1615.52	39,865	57,965
					746,786	1,144,064

[1] Benefits are computed from date of death, i.e., May 11, 1973. For purposes of these calculations, the "year" ends on September 30th. *See* 33 U.S.C. § 906 (b) (1).

[2] Spouse was born on February 1, 1918. Life expectancy at Age 60 is 19.69 years.

[3] Child was born on October 17, 1955. He receives benefits until Age 23. *See* 33 U.S.C. § 909 (b).

[4] Includes escalation factor, *see* 33 U.S.C. § 910 (f), of 6% per annum.

[5] Maximums are those set forth in 33 U.S.C. § 906 (b) (1). Average weekly wage at time of death was $798.

[6] Maximums are calculated as 50% of average weekly wage for spouse and 16⅔% of average weekly wage for child. *See* 33 U.S.C. § 909 (b).

[7] Annual benefits are calculated as 52 times the weekly benefits for years 1974-1978 and 1980-1996. For 1973, the annual benefits are calculated as (.3883 years x 52 weeks, see note *1* supra) times the weekly benefits. For 1979, the annual benefits are calculated as (.0467 years x 52 weeks, see note *3* supra) times the weekly benefit payable while the child is eligible for benefits plus (.9533 years x 52 weeks) times the weekly benefit of the spouse; see note *6* supra. For 1997, the annual benefits are calculated as (.69 yeas x 52 weeks, see note *2* supra) times the weekly benefits.

Source: National Council on Conpensation Insurance.

APPENDIX D

Comparison of Death Benefits With and Without Maximum Weekly Limitation— Fireman's Fund Insurance Co. Case No. H 640 C 777281

Year[1]	Age of Spouse[2]	Age of Child[3]	Weekly Benefits[4] With Maximum[5]	Weekly Benefits[4] Without Maximum[6]	Annual Benefits[7] With Maximum	Annual Benefits[7] Without Maximum
1976	44	9	318.38	936.05	12,961	38,107
1977	45	10	342.54	992.21	17,812	51,595
1978	46	11	367.22	1051.75	19,095	54,691
1979	47	12	389.25	1114.85	20,241	57,972
1980	48	13	412.61	1181.74	21,456	61,450
1981	49	14	437.36	1252.65	22,743	65,138
1982	50	15	463.61	1327.80	24,108	69,046
1983	51	16	491.42	1407.47	25,554	73,188
1984	52	17	520.91	1491.92	27,087	77,580
1985	53	18	552.16	1581.44	28,712	82,235
1986	54	19	585.29	1676.32	30,435	87,169
1987	55	20	620.41	1776.90	32,261	92,399
1988	56	21	657.64	1883.52	34,197	97,943
1989	57	22	697.09	1996.53	36,249	103,820
				2116.32		45,861
1990	58	23	738.92	1587.15	38,424	48,138
1991	59		783.25	1682.38	40,729	87,484
1992	60		830.25	1783.33	43,173	92,733
1993	61		880.06	1890.33	45,763	98,297
1994	62		932.87	2003.75	48,509	104,195
1995	63		988.84	2123.97	51,420	110,446
1996	64		1048.17	2251.41	54,505	117,073
1997	65		1111.06	2386.49	57,775	124,097
1998	66		1177.72	2529.68	61,241	131,543
1999	67		1248.39	2681.46	64,916	139,436
2000	68		1323.29	2842.35	68,811	147,802

Year[1]	Age of Spouse[2]	Age of Child[3]	Weekly Benefits[4] With Maximum[5]	Weekly Benefits[4] Without Maximum[6]	Annual Benefits[7] With Maximum	Annual Benefits[7] Without Maximum
2001	69		1402.69	3012.89	72,940	156,670
2002	70		1486.85	3193.67	77,316	166,071
2003	71		1576.06	3385.29	81,955	176,035
2004	72		1670.62	3588.40	86,872	186,597
2005	73		1770.86	3803.71	92,085	197,793
2006	74		1877.11	4031.93	97,610	209,660
2007	75		1989.74	4273.85	103,466	222,240
2008	76		2109.12	4530.28	109,674	235,575
2009	77		2235.67	4902.09	73,241	157,316
					1,723,336	3,967,395

[1] Benefits are computed from date of death, i.e., Dec. 19, 1975. For purposes of these calculations, the "year" ends on September 30th. *See* 33 U.S.C. § 906 (b) (1).

[2] Spouse was born in 1931. Life expectancy at Age 46 is 31.63 years.

[3] Children were born March 1, 1966, and January 1, 1959. They receive benefits until Age 23. *See* 33 U.S.C. § 909 (b).

[4] Includes escalation factor, *see* 33 U.S.C. § 910 (f), of 6% per annum.

[5] Maximums are those set forth in 33 U.S.C. § 906 (b) (1). Aveage weekly wage at time of death was $1404.

[6] Maximums are calculated as 50% of average weekly wage for spouse and 16⅔% of average weekly wage for child. *See* 33 U.S.C. § 909 (b).

[7] Annual benefits are calculated as 52 times the weekly benefits for years 1977-1989 and 1991-2008. For 1976, the annual benefits are calculated as (.7828 years x 52 weeks. See note *1* supra) times the weekly benefits. For 1990, the annual benefits are calculated as (.4167 years x 52 weeks, see note *3* supra) times the weekly benefit payable while the child is eligible for benefits plus (.5833 years x 52 weeks) times the weekly benefit of the spouse; see note *6* supra. For 2009, the annual benefits are calculated as (.63 years x 52 weeks, see note *2* supra) times the weekly benefits.

Source: National Council on Conpensation Insurance.